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No. 05-5234

IN THE
SUPREME COURT OF THE UNITED STATES

ADRIAN MARTELL DAVIS,

Petitioner

v.

STATE OF WASHINGTON,

Respondent.

On Petition for Writ of Certiorari to the
Washington Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an alleged victim's statements to a 911 operator naming her assailant – admitted as "excited utterances" under a jurisdiction's hearsay law – constitute "testimonial" statements subject to the Confrontation Clause restrictions enunciated in *Crawford v. Washington*, 541 U.S. 36 (2004).

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PETITION FOR A WRIT OF CERTIORARI

Adrian Martell Davis respectfully petitions for a writ of certiorari to the Washington Supreme Court in *State v. Davis*, No. 73893-9.

OPINIONS BELOW

The opinion of the Washington Supreme Court is reported at ___ Wn.2d ___, 111 P.3d 844 (Wash. 2005), and is attached at App. 1-11. The opinion of the Washington Court of Appeals is published at 116 Wn. App. 81, 64 P.3d 661 (Wash. App. 2003), and is attached at App. 12-20. The relevant order of the trial court is unpublished.

STATEMENT OF JURISDICTION

The Washington Supreme Court issued its opinion on May 12, 2005. App. 1. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

STATEMENT OF THE CASE

This case presents this Court with an opportunity to clarify the bounds of the recent landmark decision in *Crawford v. Washington*, 541 U.S. 36 (2004), with respect to the question that is troubling the lower courts more deeply than any other: Whether an alleged victim's report to a governmental agent describing criminal activity that allegedly occurred moments ago – admissible as an excited utterance under a jurisdiction's hearsay law – constitutes a "testimonial" statement, and thus may not be introduced against the accused absent a showing of the victim's unavailability and a prior opportunity for cross-examination.

1. The City of Kent, Washington, like other political subdivisions in the United States, maintains a 911 telephone system. Dialing 911 connects a caller with an operator "associated with the police," App. 5, and allows the caller to request emergency assistance or to register less urgent complaints. The City's website advises its citizens: "If you need to see a police officer, want to report a crime, or observe suspicious activity, call 9-1-1. Even if it is not an 'emergency.'" <http://www.ci.kent.wa.us/emergency/911.asp>.

911 operators in Kent, as elsewhere, are trained to gather information from callers and to coordinate quick responses. In order to maintain "a uniform method of interviewing callers requesting police assistance," Policy 602 of the Standard Operating Procedures for Kent's 911 system supplies detailed guidelines "to be used during the interview of a reporting party" during a "police incident interview." App. 21-23 (attaching Policy); *see also* App. 9 n.5 (Sanders, J., dissenting) (discussing this Policy). It instructs: "On all police related calls, the call taker shall obtain pertinent information, such as where the incident occurred, what type of incident occurred, when the incident occurred, if weapons were involved, who was involved, why it occurred and the reporting party's information." App. 21. The Policy then outlines several suggested questions for obtaining this information. App. 21-23. Because "[a]n officer may arrest a subject on information given to him by a [911 operator]," the Standard Operating Procedures direct operators to "[q]uestion aggressively" and to "[b]e tenacious in obtaining information from reporting parties." Standard Operating Procedures, Section 4, at 29.

2. Just before noon on February 1, 2001, Michelle McCottry, a resident of Kent, Washington, called 911. A 911 operator answered, but McCottry hung up before saying

anything. The operator called McCottry right back and asked her what was happening. McCottry, who sounded "hysterical and crying," said that a man who "had left the residence moments earlier" had beat her with his fists. App. 3. After the operator told McCottry she had "help started" (presumably meaning that police were on the way) the operator urged McCottry to "[l]isten to me carefully," App. 24, and then commenced a series of questions that "followed [Policy 602] almost exactly." App. 9 n.5 (Sanders, J., dissenting). This part of the call began with the following exchange:

911 Operator:	. . . Do you know his last name?
Complainant:	It's Davis.
911 Operator:	Davis? Okay, What's his first name?
Complainant:	Adr[i]an.
911 Operator:	What is it?
Complainant:	Adrian.
911 Operator:	Adrian.
Complainant:	Yeah.
911 Operator:	Okay. What's his middle initial?
Complainant:	Martell. . . .

App. 24-25. Later in the interview, which lasted about four minutes, McCottry also provided the operator Davis' birthdate and said that she had a protection order against him. App. 26-27. When the operator asked McCottry at one point whether she needed an "aid car," she answered, "No, I'm all right." App. 25.[1]

Two police officers arrived at McCottry's house minutes after the 911 call ended. "They noted that McCottry was still very upset and had what appeared to be fresh injuries on her forearm and her face." App. 3. The police later arrested Davis.

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[1] A transcript of the 911 call, as it ultimately was admitted into evidence at trial, is attached at App. 24-27. Three passages from the call, in which McCottry repeatedly tells the operator that the police were at her house two days ago and that there should be a warrant for Davis' arrest, were redacted for trial on the ground that their prejudicial effect outweighed their probative value. The trial court, of course, had the entire 911 call before it when it made its pretrial Confrontation Clause and hearsay rulings.

3. The State charged Davis with one count of violating a domestic no-contact order, Wash. Rev. Code § 26.50.110(1) & (4), a charge that the State made a felony by including a special allegation that Davis assaulted McCottry. App. 7. McCottry did not appear for trial, and the State did not attempt to prove that she was unavailable. Report of Proceedings (Sept. 4, 2001), at 35. Instead, in a pretrial hearing, the prosecution asked the trial court to rule that the statements McCottry made during the 911 call and later to the responding police officers were admissible as "excited utterances" under state hearsay law regardless of McCottry's availability.

The trial court excluded McCottry's later statements to the officers but ruled, over Davis' objection, that the entire 911 interview was admissible because McCottry's answers to the operator's questions were excited utterances. The trial court further rejected Davis' argument that McCottry's statements failed the multi-factor reliability framework that Washington used at the time to assess Confrontation Clause objections. *Cf. Crawford,* 541 U.S. at 63 (referencing this multi-factor test).

At trial, the State presented testimony from only two live witnesses, the two police officers who had responded to McCottry's call. The prosecutor also played the 911 tape. Davis' attorney argued in closing that there was insufficient evidence to convict. She emphasized that the only evidence suggesting Davis was ever in McCottry's house on the day at issue, McCottry's statements during the 911 call, had not been given in court, under oath, or even subject to cross-examination. Report of Proceedings (Sept. 5, 2001), at 48. The prosecutor offered the following rebuttal:

> [Davis' attorney] would like you to believe that . . . no one you heard from saw this crime. That is not true. You have the voice of Ms. McCottry on that 911 tape. She reported it right when it happened.

> [J]ust consider that there was a person present and that person is Ms. McCottry and although she is not here today to talk to you she left you something better. *She left you her testimony on the day that this happened.* February 1st, 2001, this shows that the defendant, Adrian Davis was at her home and assaulted her. It is right here in her voice.

Id. at 55 (emphasis added). The prosecutor then played the 911 tape again, quickly summarized how this "testimony" established the elements of the crime charged, and rested her case. *Id.* at 55-56. The jury returned a guilty verdict.

4. The Washington Court of Appeals affirmed Davis' conviction. As is relevant here, the Court of Appeals held that the trial court properly classified McCottry's answers to the 911 operator's questions as excited utterances. App. 15-16. It also held that the State's use of the 911 tape satisfied the requirements of the Sixth Amendment's Confrontation Clause under the then-controlling constitutional framework established in *Ohio v. Roberts*, 448 U.S. 56 (1980). The *Roberts* framework provided that any out-of-court statements falling within a "firmly rooted" hearsay exception were sufficiently reliable to be offered against the accused, and that the excited utterance exception was a firmly rooted one. App. 16.

5. The Washington Supreme Court granted Davis' petition for discretionary review. While the case was pending, this Court abandoned the *Roberts* framework and held in *Crawford v. Washington*, 541 U.S. 36 (2004), that the Confrontation Clause bars the use of "testimonial" hearsay against criminal defendants unless the declarants are unavailable and the defendants had a prior opportunity to cross-examine them. The Washington Supreme Court received supplemental briefing and held a second oral argument concerning whether the State's use of the 911 call contravened *Crawford*.

The Washington Supreme Court held, by an 8-1 vote, that "the information essential to the prosecution of this case was McCottry's initial identification of Davis as her assailant" and that that identification was "nontestimonial and properly admitted." App. 7. The majority first discussed a California appellate decision saying it was doubtful whether there could exist "any circumstances under which a statement qualifying as an excited utterance would be testimonial." App. 5 (citing *People v. Corella*, 18 Cal. Rptr. 3d 770, 776 (Cal. App. 2004)). Without resolving this doubt, the majority then stated that a 911 call "must be scrutinized to determine whether it is a call for help to be rescued from peril or is generated by a desire to bear witness." App. 5. Apparently positing that every 911 call could neatly be characterized as one or the other, the majority concluded that McCottry's identification of Davis was nontestimonial because "there is no evidence that McCottry sought to 'bear witness' in contemplation of legal proceedings." App. 7.

Justice Sanders dissented. He found it irrelevant that McCottry's responses to the 911 operator's questions to identify her alleged assailant qualified as excited utterances. App. 10. In addition, the dissent rejected the majority's test requiring an inquiry into the subjective intent of 911 callers. It read *Crawford* to "dictate[] an objective standard," focusing on "whether the statement fulfills the function of prosecution testimony." App. 8 (quotation omitted). The dissent found it "clear that the 911 call in this case fulfilled th[at] function." App. 9. "[A] reasonable person today who calls 911 in connection with a criminal act could anticipate that his or her statement would be used in investigating and prosecuting a crime." App. 9.

REASONS FOR GRANTING THE WRIT

In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court abandoned its prior framework for assessing Confrontation Clause claims and held that "testimonial" statements may not be introduced at trial against criminal defendants unless the declarants are unavailable and the defendants had an opportunity to cross-examine them. This Court expressly declined to offer a "comprehensive" definition of testimonial. *Id.* at 68. But it did note that the victim's statements in *White v. Illinois*, 502 U.S. 346 (1992), "to an investigating police officer admitted as spontaneous declarations" were "testimonial" and "arguably" should have been excluded by the Confrontation Clause. *Crawford*, 541 U.S. at 58 n.8.

In the sixteen months since *Crawford*'s paradigm shift, federal and state courts have adopted divergent views of the term "testimonial." The single issue over which these courts have divided most deeply (in three different ways, in fact) is whether alleged victims' statements similar to those in *White* – that is, statements to governmental agents describing criminal conduct that allegedly occurred minutes ago – are testimonial. State courts regularly classify such statements to 911 operators or responding police officers as spontaneous declarations (also known as "excited utterances") under their hearsay law, so the constitutionality of using them against defendants when the declarants do not appear at trial presents a vitally important issue concerning the administration of criminal justice.

This Court should take this opportunity to resolve this issue. *Crawford*'s testimonial principle is applied on a daily basis in courts across the Nation, and courts and practitioners are urgently in need of further guidance concerning how far the rule extends. Indeed, the growing number of appellate decisions like the one here – which exempt from *Crawford*'s reach most any statement that modern hearsay law characterizes

as an excited utterance – are already affecting prosecutorial and law enforcement practices. Prosecutors are urging 911 and other crime-detecting agencies to "develop protocols for identifying and recording excited utterances," on the assumption that obtaining victims' statements while they are still under the influence of startling events is sufficient to "get around *Crawford*." Wendy Murphy, *New Strategies for Effective Child Abuse Prosecutions After* Crawford, 23 ABA Child Law Practice 129, 129 (Oct. 2004) (discussing police department protocols); *see also* Erin Leigh Claypoole, *Evidence-Based Prosecution: Prosecuting Domestic Violence Cases Without a Victim,* 39 Prosecutor 18, 20-21 (Feb. 2005) (911 protocols). Because this narrow conception of *Crawford* ignores the decision's discussion of *White* and is in serious tension with the core value of adversarial testing that the testimonial principle is designed to vindicate, this Court should act promptly to address its propriety and to elucidate the testimonial principle with greater specificity.

A. Courts Are Deeply Divided Over Whether Alleged Victims' Statements To Governmental Agents Describing Recent Criminal Activity – Admitted As Excited Utterances Under A Jurisdiction's Hearsay Law – Constitute "Testimonial" Statements.

In *Crawford v. Washington,* this Court abandoned its prior conception of the Confrontation Clause in favor of the "testimonial approach." Under the prior approach, encapsulated in *Ohio v. Roberts,* 448 U.S. 56 (1980), the prosecution could use any out-of-court statement against a defendant that the trial court found to be sufficiently reliable. This reliability inquiry turned on whether the statement fell within a "firmly rooted" hearsay exception, such as the exception for excited utterances, or bore "particularized guarantees of trustworthiness." *Id.* at 66. Now, however, "[w]here *testimonial* evidence is at issue, . . . the Sixth Amendment demands what the common law required:

unavailability [of the declarant] and a prior opportunity for cross-examination." *Crawford,* 541 U.S. at 68 (emphasis added). When testimonial evidence is at issue, in other words, it is immaterial whether the proffered evidence falls within a "firmly rooted" hearsay exception or otherwise appears substantively reliable.

The *Crawford* Court noted three potential formulations of the term "testimonial," *id.* at 51-52, and it held that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to [statements given during] police interrogations." *Id.* at 68. The latter category, this Court explained, includes, at the very least, recorded statements given "in response to structured police questioning." *Id.* at 53 n.4.

This Court also noted that the "statements of a child victim to an investigating police officer admitted as spontaneous declarations" in *White v. Illinois,* 502 U.S. 346 (1992), were "testimonial statements" whose use at trial "arguably" violated the Confrontation Clause. *Crawford,* 541 U.S. at 58 n.8. But this Court did not dwell on this issue at length, for the statement at issue in *Crawford* itself was a recorded statement given during a custodial interrogation and thus was unquestionably inadmissible. *See id.* at 53 n.4, 68. Indeed, the *Crawford* opinion concluded by expressly "leav[ing] for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Id.* at 68. This Court acknowledged that this "refusal to articulate a comprehensive definition" would cause "interim uncertainty," but suggested this uncertainty could, and would, be alleviated by expounding on the testimonial principle in future cases. *Id.* at 68 n.10.

The uncertainty the *Crawford* opinion created has come to fruition most acutely in the realm of statements like those at issue in *White* – alleged victims' "excited utterances"

to 911 operators, police officers, or other governmental agents describing criminal activity that allegedly occurred minutes ago. This Court has granted certiorari, vacated, and remanded one decision involving such a statement for further consideration in light of *Crawford*. *Siler v. Ohio*, 125 S. Ct. 671 (2004) (No. 04-6765), *GVR'ing State v. Siler*, 2003 WL 22429053 (Ohio App. 2003). But this Court has not yet addressed in a post-*Crawford* case on the merits whether these types of statements – or any other types of statements – are testimonial.

Meanwhile, courts – sometimes in the same jurisdiction – have divided three different ways over whether excited utterances describing recent criminal activity to a governmental agent are testimonial. The first group of courts from five jurisdictions holds that such a statement's status under modern hearsay law as an excited utterance automatically places it beyond *Crawford*'s reach. *See United States v. Luciano*, ___ F.3d ___, Slip Op. at 12-13 & n.3 (1st Cir. July 8, 2005) (statement is not testimonial when it is "an excited utterance"); *State v. Anderson*, 2005 WL 171441, at *4 (Tenn. App. Jan. 27, 2005) (publication designation pending) (excited utterances to responding officers "cannot be testimonial"); *People v. King*, ___ P.3d ___, 2005 WL 170727, at *4-6 (Colo. App. Jan. 27, 2005) (while classification may not be "dispositive" in other contexts, excited utterances to responding officers are, by definition, nontestimonial); *State v. Cannaday*, 2005 WL 736583, at *6 (Ohio App. March 31, 2005) (unpublished opinion) (*Crawford* does not apply to statements "that are . . . subject to common-law exceptions to the hearsay rule, such as excited utterances")[2]; *State v. Wright*, 686 N.W.2d 295, 302 (Minn. App.) (911 call nontestimonial; suggesting that statement to responding officer

[2] *See also City of Akron v. Hutton*, 2005 WL 1523880, at ¶¶ 15-17 (Ohio App. June 29, 2005) (unpublished opinion) (reaffirming this approach).

also was nontestimonial because a statement's status as an excited utterance "is inconsistent with a determination" that it is testimonial), *review granted* (Minn. 2004).[3] Two family court judges also have published an article taking this position in the national journal for such judges. *See* Judge Amy Karan & Judge David M. Gersten, *Domestic Violence Hearsay Exceptions in the Wake of* Crawford v. Washington: *A View From the Bench*, 13 Juvenile & Family Just. Today 20, 22 (Summer 2004) <http://www.ncdsv.org/images/ DVHearsayExceptionsWakeCrawford.pdf>. Courts taking this position reason, as the Tennessee Court of Appeals put it, that "[b]ecause an excited utterance is a reactionary event of the senses made without reflection or deliberation, it cannot be testimonial in that such a statement has not been made in contemplation of its use in a future trial." *Anderson*, 2005 WL 171441, at *4. Accordingly, these courts have established a categorical rule that when an alleged victim makes an excited utterance to a governmental agent, "in a noncustodial setting without indicia of formality, the statement is nontestimonial." *King*, ___ P.3d at ___, 2005 WL 170727, at *6.

A second group of courts, including the Washington Supreme Court here, from seventeen jurisdictions has rejected (sometimes explicitly and sometimes implicitly) the position that all "excited utterances" describing recently completed crimes to governmental agents are exempt from *Crawford*'s reach. Instead, these courts hold, in general terms, that whether such statements are testimonial depends on the speakers' supposed purposes in making them and the governmental agents' actions at the time. *See* App. 5-7 (911 call; nontestimonial); *Leavitt v. Arave*, 383 F.3d 809, 830 n.22 (9th Cir.

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[3] *See also State v. Wright*, 2005 WL 147487, at *3-4 (Minn. App. Jan. 25, 2005) (unpublished opinion) (responding officer; nontestimonial), *review denied* (Minn. 2005).

2004) (911 call and statement to responding officer; nontestimonial), *cert. denied*, 125 S. Ct. 2540 (2005)[4]; *Mungo v. Duncan*, 393 F.3d 327, 336 n.9 2d Cir. 2004) (responding officer; dicta suggesting initial statements nontestimonial and subsequent statements testimonial); *State v. Greene*, 874 A.2d 750, 771-76 (Conn. 2005) (responding officer; nontestimonial); *Hammon v. State*, ___ N.E.2d ___, 2005 WL 1406007, at *1 (Ind. June 16, 2005) (responding officer; nontestimonial); *State v. Hembertt*, 696 N.E.2d 473, 482-83 (Neb. 2005) (responding officer; initial statements nontestimonial, but suggesting statements a few minutes later were testimonial); *Stancil v. United States*, 866 A.2d 799, 809 (D.C. 2005) (responding officer; remanded for additional factfinding)[5]; *State v. Barnes*, 854 A.2d 208, 211 (Me. 2004) (statement at police station; nontestimonial); *People v. Diaz*, ___A.D. ___, 2005 WL 1514448, at *4-6 (N.Y. App. June 28, 2005); *State v. Ruth*, ___ S.W.3d ___, 2005 WL 1431324, at *6-7 (Tex. App. June 21, 2005) (911 call; nontestimonial)[6]; *Anderson v. State*, 111 P.3d 350 (Alaska App. 2005) (responding officer; nontestimonial); *People v. Walker*, 697 N.W.2d 159, 161-66 (Mich.

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[4] *See also Massey v. Lamarque*, 2005 WL 1140025 (9th Cir. May 9, 2005) (unpublished opinion) (applying *Leavitt* to hold that "spontaneous statement in the 911 tape was not testimonial").

[5] *See also Drayton v. United States*, ___ A.2d ___, 2005 WL 1413862 (D.C. June 16, 2005) (responding officer; testimonial).

[6] *See also Marc v. State*, ___ S.W.3d ___, 2005 WL 1294969, at *10 (Tex. App. June 2, 2005) (responding officer; nontestimonial); *Spencer v. State*, 162 S.W.3d 877, 881-83 (Tex. App. 2005) (responding officer; nontestimonial); *Davis v. State*, 2005 WL 183141, at *4 (Tex. App. Jan. 27, 2005) (unpublished opinion) (responding officer; nontestimonial); *Wilson v. State*, 151 S.W.3d 694, 697-98 (Tex. App. 2004) (responding officer; nontestimonial), *review denied* (Tex. 2005). One division of the Texas Court of Appeals has adopted an almost categorical approach, holding that "the underlying rationale of an excited utterance supports a determination that it is not testimonial in nature" because it is "likely to be truthful" and not made "in contemplation of its use in a future trial." *Key v. State*, ___ S.W.3d ___, 2005 WL 467167, at *5 (Tex. App. Feb. 28, 2005), *review denied* (Tex. June 29, 2005).

App.) (2-1 decision) (responding officer; nontestimonial), *appeal granted* (Mich. June 17, 2005)[7]; *State v. Alvarez*, 107 P.3d 350, 354-56 (Ariz. App. 2005) (responding officer; nontestimonial); *Commonwealth v. Gray*, 867 A.2d 560, 577 (Pa. App. 2005) (responding officer; initial statement testimonial; statement ten minutes later unresolved); *People v. Corella*, 18 Cal. Rptr. 3d 770, 776 (Cal. App. 2004) (911 call and statement to responding officer; nontestimonial)[8]; *State v. Forrest*, 596 S.E.2d 22, 27 (N.C. App. 2004) (2-1 decision) (responding officer; nontestimonial), *aff'd*, 611 S.E.2d 833 (N.C. 2005) (per curiam); *Packer v. State*, ___ So.2d ___, 2005 WL 1252752 (Ala. Crim. App. May 27, 2005) (911 call and statements to responding officer; nontestimonial).

Two of these decisions – one in the 911 context and one in the responding officer context – are representative. In the decision below, the Washington Supreme Court reasoned that excited-utterance statements in 911 calls must be scrutinized on a case-by-case basis "to determine whether [the 911 call] is a call for help to be rescued from peril or is generated by a desire to bear witness." App. 5. When the caller is motivated by the former, her description of criminal activity is not testimonial, no matter how much it "assist[s] police in investigation or assist[s] the State in prosecution." *Id.*; *see also* App. 7 (statement not testimonial even though it was "essential to the prosecution of this case").

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[7] *See also People v. Bryant*, 2004 WL 1882661, at *1 (Mich. App. Aug. 24, 2004) (unpublished opinion) (responding officer; nontestimonial); *People v. Bechtol*, 2004 WL 2726076, at *3 (Mich. App. Nov. 30, 2004) (unpublished opinion) (responding officer; nontestimonial).

[8] *See also People v. Cage*, 15 Cal. Rptr. 3d 846, 856-57 (Cal. App.) (alleged victim's statements to officer at hospital shortly after event not testimonial), *review granted* (Cal. 2004); *People v. Caudillo*, 19 Cal. Rptr. 3d 574 (Cal. App. 2004) (911 call not testimonial); *People v. Kilday*, 20 Cal. Rptr. 3d 161 (Cal. 2004), *review granted* (Cal. 2005) (initial statements to responding officers nontestimonial, but statements after the scene is "secure" testimonial).

In the same vein, the Nebraska Supreme Court recently held that "some excited utterances [to responding officers] are testimonial and others are not, depending upon the circumstances." *Hembertt*, 696 N.W.2d at 480. When a scene has been assessed and secured, statements officers obtain acting in their "investigatorial capacit[ies] in anticipation of an eventual criminal prosecution" are testimonial. *Id.* at 482-83. But while the police are attempting to "assess the situation and secure the scene," any statements witnesses make describing the crime that just occurred – whether or not they are in response to officers' "preliminary questions" – are not testimonial. *Id.*

Even within this group of courts, however, significant disagreement exists regarding how to conduct the inquiries into declarants' motivations and governmental agents' actions. As one commentator recently summarized the situation:

> Courts that scrutinize victims' [excited utterances] to responding officers look to a long list of considerations, and apply those considerations inconsistently. For example, some courts hold that the informality of communication between the declarant and the police is a factor that militates in favor of admissibility; other courts flatly reject this notion. Some courts focus on whether an adversarial relationship exists between the declarant and the police; this consideration is immaterial in other courts. . . . Some courts hold that the declarant's initiation of communication with police makes her statement nontestimonial; other courts do not treat such statements any differently from police initiated conversation. Some courts imply that a statement is not testimonial when officers listen passively; other courts do not ascribe much significance to the ardor of the officers' questioning. . . .
>
> [Courts also] show varying interest in the intent of the parties to the conversation. Some courts place great emphasis on the motivation of the interviewers to gather evidence; other courts show little interest in the motivation of the interviewers. Some courts find a statement to be nontestimonial if the declarant's primary motive was not to provide a statement for use by the prosecution, but rather to

> avoid imminent danger; other courts reject the "primary motivation" test . . . .

Tom Lininger, *Prosecuting Batterers After* Crawford, 91 Va. L. Rev. 747, 779-80 (2005) (footnotes and citations omitted). This group of courts, in short, accepts that not all excited utterances are testimonial but also refuses – for various, often internally inconsistent reasons – to hold that all statements knowingly describing recently completed criminal conduct to governmental agents are testimonial.

In direct contrast to the first two groups of courts, courts in eleven jurisdictions have held, as the dissent below argued, that statements alleged victims make to 911 operators or responding officers describing recently completed criminal activity are testimonial, regardless of whether they constitute excited utterances and regardless of the victims' or governmental agents' supposed motives at the time. *See* App. 8-11 (Sanders, J., dissenting); *United States v. Arnold*, ___ F.3d ___, 2005 WL 1431484 (6th Cir. June 21, 2005) (911 call and statements to responding officers identifying assailant); *Moody v. State*, 594 S.E.2d 350, 353-54 & nn.5-6 (Ga. 2004) (alleged victim's statements to responding officer)[9]; *Lopez v. State*, 888 So.2d 693, 700 (Fla. App. 2004) (responding officer)[10]; *Mason v. State*, ___ S.W.3d ___, 2005 WL 1531286 (Tex. App. June 30, 2005) (responding officer); *State v. Grace*, 111 P.3d 28, 30-31, 38 (Haw. App.) (responding officer), *cert. denied* (Haw. 2005); *State v. Hill*, 827 N.E.2d 351, 358-59 (Ohio App.

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[9] *See also Senior v. State*, ___ S.E.2d ___, 2005 WL 1208102, at *2 (Ga. App. May 23, 2005) (statement to responding fire investigator); *Miller v. State*, ___ S.E.2d ___, 2005 WL 1423393, at *2 (Ga. App. June 20, 2005) (responding officer; nontestimonial).

[10] *See also Howard v. State*, ___ So.2d ___, 2005 WL 1248965 (Fla. App. May 27, 2005) (victim's excited utterance to responding officer identifying assailant); *Manuel v. State*, ___ So.2d ___, 2005 WL 1130183 (Fla. App. May 16, 2005) (same).

2005) (statement to responding officer identifying assailant)[11]; *People v. Victors*, 819 N.E.2d 311, 320 (Ill. App. 2004) (majority opinion & O'Malley, P.J., concurring) (victim's statements to responding officers "at the scene of the alleged incident mere minutes after the incident supposedly occurred"), *appeal denied*, ___ N.E.2d ___ (Ill. Mar. 30, 2005)[12]; *State v. Clark*, 598 S.E.2d 213, 217 (N.C. App.) (responding officer), *review denied*, 601 S.E.2d 866 (N.C. 2004)[13]; *People v. Cortes*, 781 N.Y.S.2d 401, 415 (N.Y. Sup. Ct. 2004) (911 call)[14]; *Heard v. Commonwealth*, 2004 WL 1367163, at *3-5 (Ky. App. June 18, 2004) (unpublished opinion) (alleged victim's statements to responding police officer identifying assailant), *review granted* (Ky. 2004); *People v. Adams*, 16 Cal. Rptr. 3d 237, 244 (Cal. App) (responding officer), *review granted* (Cal. 2004); *see also United States v. Andrews*, 2005 WL 1395049, at *2 (11th Cir. June 14, 2005) (unpublished opinion) ("assuming" that statement to 911 operator identifying

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[11] *State v. Lee*, 2005 WL 1540575, at ¶¶ 13-14 (Ohio App. July 1, 2005) (publication designation pending) (statement to responding officer identifying assailant).

[12] In another case, the Illinois Court of Appeals stated it was adopting a case-by-case approach, but held, contrary to the Washington Supreme Court here and other courts in the second group above, that statements made in response to a 911 operator's questions to describe alleged assailants or criminal conduct are, by definition, testimonial. *People v. West*, 823 N.E.2d 72, 81-82 (Ill. App. 2005). Explaining that "a court should examine a caller's statement in the same manner it would a victim's statement to a treating medical professional," *id.* at 81, the Illinois Court of Appeals referred to a prior decision holding that a victim's statements describing her physical condition are not testimonial but – in direct opposition to the Washington Supreme Court here – that statements "identifying respondent as the perpetrator" are testimonial. *In re T.T.*, 815 N.E.2d 789, 803-04 (Ill. App. 2004).

[13] *See also State v. Lewis*, 603 S.E.2d 559, 562-63 (N.C. App.) (victim's statement to responding officer), *review allowed and appeal dismissed*, 605 S.E.2d 638 (N.C. 2004).

[14] *See also People v. Dobbin*, 791 N.Y.S.2d 897 (N.Y. Sup. Ct. 2004). Prior to the state Supreme Court weighing in, a lower New York court had held that statements describing a crime to a 911 operator were not testimonial. *See People v. Moscat*, 777 N.Y.S.2d 875 (N.Y. Crim. Ct. 2004).

assailant was testimonial); *State v. Rapp*, 2005 WL 1397205, at *1-2 (Iowa App. June 15, 2005) (unpublished opinion) ("[a]ssuming" 911 call to report domestic violence incident was testimonial). Consequently, these courts exclude statements made "under the same or similar circumstances" as even the courts employing a case-by-case approach to excited utterances. *Davis v. State*, ___ S.W.3d ___, 2005 WL 1173964, at *6 (Tex. App. May 19, 2005) (collecting and discussing several "conflicting decisions").[15]

Once again, two cases are fairly representative. In holding that an alleged victim's 911 call and statements minutes later to responding officers were testimonial, the Sixth Circuit reasoned:

> Although one purpose of the 911 call may have been to secure assistance, it remains that [the caller] could also reasonably expect the statements to be used in a future trial. In addition, [the caller's] statements were declarations made for the purpose of "establishing or proving some fact." [*Crawford*, 541 U.S. at 51] (quotation and citation omitted). It would be antithetical to this entire examination were the government to suggest that [the caller] made the statements for any other reason than to establish that the alleged incident occurred.

Arnold, ___ F.3d at ___; 2005 WL 1431484, at *6. Turning back the dissent's argument that excited utterances to 911 operators and responding officers should be assessed, as the Washington Supreme Court held, on a "case-by-case basis" according to declarants' subjective motivations, *id.* at *16-18 (Sutton J., dissenting), the Sixth Circuit ruled categorically that statements "made knowingly to authorities, describ[ing] criminal activity" are testimonial. *Id.* at *6; *see also Cortes*, 781 N.Y.S.2d at 415 (a 911 call that

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[15] It also bears mention that the New Jersey Supreme Court recently held, contrary to some prior suggestions in state law, that an alleged victim's statements to a responding officer ten minutes after the incident could not be admitted as excited utterances. *State v. Branch*, 865 A.2d 673 (N.J. 2005). The court stated its holding was "informed by" the Sixth Amendment principles enunciated in *Crawford*. *Branch*, 865 A.2d at 690.

reports criminal activity is testimonial; "it makes no difference what the caller believes"). In another case involving a victim's statements to a responding officer, the Florida Court of Appeals has reasoned quite simply that telling a police officer that someone just committed a crime "does not lose its character as a testimonial statement merely because the declarant was excited at the time it was made." *Lopez*, 888 So.2d at 699-700.

There can be no doubt that the law in this area is in total disarray. Post-*Crawford* cases involving excited utterances made to 911 operators and responding officers are generating a sprawling patchwork of confusion and contradictions. This Court is the only institution that can bring order to the escalating turmoil in the lower courts.

B. The Decision Below Interprets *Crawford*'s Testimonial Principle Too Narrowly.

The Washington Supreme Court's decision – like other courts' decisions holding that alleged victims' excited-utterance statements to governmental agents describing crimes that just have occurred are not testimonial – refuses to come to grips with the paradigm shift that *Crawford* effectuated. *Crawford*'s testimonial principle reinvigorates the Confrontation Clause's fundamental commitment, as Justice Thomas put it years earlier, to the "adversary process." *White*, 502 U.S. at 365 (Thomas, J., concurring in part and concurring in the judgment); *see also Crawford*, 541 U.S. at 42-52. It requires that the Clause be interpreted at all times with its original "focus" in mind – namely, prohibiting the use of "*ex parte* examinations as evidence against the accused." *Crawford*, 541 U.S. at 50.

The practice of trying defendants based on statements alleged victims give to 911 operators or responding officers is antithetical to the adversarial process the testimonial principle is designed to protect. The 911 service contractor in this case describes its

interactions with alleged victims as "police incident interviews," App. 21, and rightfully so: Operators, as agents of the State, carry out such interviews not only for the purpose of facilitating responses to any needs for assistance but also to begin gathering information that may be useful in the police's investigating and the State's prosecuting criminal cases. The identity of an alleged offender is foremost among such useful information. The police, of course, may use these interviews to further their investigations, but if the prosecution attempts to use them as substantive evidence of guilt in a criminal trial, the Confrontation Clause's concerns respecting the inadequacies of *ex parte* examinations, and the need to subject witness testimony to cross-examination, come squarely into play.

The Washington Supreme Court nevertheless held the statements the alleged victim, Michele McCottry, made identifying her alleged assailant were not testimonial for three primary reasons: (1) it is "difficult to perceive any circumstances under which a statement qualifying as an excited utterance would be testimonial," App. 5 (citing *Corella,* 18 Cal. Rptr. 3d at 776); (2) McCottry supposedly called 911 "because of an immediate danger" rather than to "assist the police in investigation or assist the State in prosecution," App. 5, 7; and (3) more generally, a 911 interview is "not of the same nature" as *ex parte* examinations in the civil law mode. App. 5.

A proper understanding of *Crawford* demonstrates that none of these reasons for holding that McCottry's statements were not nontestimonial has merit.

1. That an alleged victim's statements describing criminal activity to a governmental agent qualify as excited utterances under a jurisdiction's hearsay law neither suggests (as the Washington Supreme Court indicated) nor automatically means

(as other courts have held) that they are exempt it from *Crawford*'s reach. *Crawford* made clear that the right to confrontation is a procedural right; it no longer turns on "the vagaries of the rules of evidence." 541 U.S. at 61; *see also United States v. Cromer*, 389 F.3d 662, 677 (6th Cir. 2004) ("If there is one theme that emerges from *Crawford*, it is that the Confrontation Clause confers a powerful and fundamental right that is no longer subsumed by the evidentiary rules governing the admissibility of hearsay statements."). Accordingly, as the dissent below recognized (App. 10), the dangers that require statements with testimonial characteristics to be subjected to cross-examination "do[] not evaporate" when the statements "happen to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances." *Crawford*, 541 U.S. at 56 n.7; *see also* Robert P. Mosteller, Crawford v. Washington: *Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. Rich. L. Rev. 511, 547 (2005) ("[T]here is no theoretical basis to assume that, simply because a statement falls within a modern-day exception, it was intended to be excluded from protection of the Confrontation Clause if it has testimonial characteristics.").

That is precisely the case with respect to "excited utterances," such as those here, made in response to a governmental agent asking who committed a potential crime. As *Crawford* noted, the scope of the hearsay rule when the Sixth Amendment was adopted sheds light on the reach of the testimonial principle, *id.* at 55-56, and "to the extent the hearsay exception for spontaneous declarations existed at all [in 1791], it required that the statements be made immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage." *Id.* at 58 n.8 (alterations in original; quotation and citation omitted). If a startling or stressful incident was complete

– even if it ended only minutes before – statements answering questions or describing the incident were not admissible. *See* Richard D. Friedman and Bridget McCormack, *Dial-In Testimony*, 150 U. Pa. L. Rev. 1171, 1212-16 (2002) (collecting historical sources). This rule against admitting narrations of completed events remained firm into the twentieth century. *See id.* at 1216-20.

The modern version of the excited utterance exception, however, "is much more expansive" than the exception was for most of our history, "and only a few of the statements currently received under it would likely meet that more limited historical antecedent." Mosteller, 39 U. Rich. L. Rev. at 577 (footnote omitted); *see also* Friedman & McCormack, 150 U. Pa. L. Rev. at 1217-23. Washington courts, for example, have acknowledged that Washington's modern excited utterance rule "is not as restrictive as the requirements of the common law exception," *State v. Dixon*, 684 P.2d 725, 728 (Wash. App. 1984), and have held that alleged victims' statements made several minutes or hours after upsetting incidents can constitute excited utterances, even if made in response to governmental agents' questions. *See State v. Thomas*, 83 P.3d 970, 987 (Wash. 2004) (collecting examples); *State v. Williamson*, 996 P.2d 1097, 1102-03 (Wash. App. 2000) (victim's statements at police station after being promised suspect would be arrested constituted excited utterances); *State v. Morrison*, 1999 WL 429806 (Wash. App. 1999) (unpublished opinion) (statements in interview with police officer four to five hours after incident were excited utterances). Most other states in modern times have developed similarly broad excited utterance rules. *See, e.g., Spencer*, 162 S.W.3d 881 ("Texas courts have held that a declarant's state of excitement can last long after the initial crime and that excited utterances can be made both spontaneously or in response to

questioning."); *Stancil*, 866 A.2d at 808 (recounting modern expansion of exception in District of Columbia); *People v. Brown*, 517 N.E.2d 515, 517-522 (N.Y. 1987) (same in New York and other jurisdictions).

Wigmore, whose modern treatise on evidence advocated a broad formulation of the excited utterance exception, openly acknowledged that narrative statements describing past events were "testimonial," as he used that term. 6 John Henry Wigmore, Evidence § 1746, at 194 (J. Chadbourn ed. 1976); *see also id.* § 1756.[16] But even when the interviewers were governmental agents, Wigmore did not perceive this as posing a Confrontation Clause problem because he thought the Clause did "not prescribe what kinds of testimonial statements . . . shall be given infrajudicially – this depends [exclusively] on the law of evidence for the time being." 3 *id.* at § 1397; *see also Crawford*, 541 U.S. at 50-51 (reciting Wigmore's view).

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[16] Wigmore said:

> Whenever, therefore, an [excited] utterance *is* used as testimony that the *fact asserted in it did occur* as asserted, i.e., on the credit of the speaker as a credible person, it is being used testimonially, and is within the [general] prohibition of the hearsay rule.
>
> Now this testimonial use is precisely the use that is made of the present class of statements. . . . [T]hey clearly do involve the testimonial use of the assertion to prove the truth of the fact asserted – for example, *when the injured person declares who assaulted him* or whether the locomotive bell was rung, or when the bystander at an affray exclaims that the defendant shot first. Such statements are genuine instances of using a hearsay assertion testimonially; i.e., we believe that Doe shot the pistol, or that the bell was rung, *because* the declarant so asserts – which is essentially the feature of all human testimony.

Wigmore, *supra*, at §1746, at 194 (emphasis added).

Although Wigmore's understanding of the Confrontation Clause – and, relatedly, the *Roberts* framework – gave states like Washington open field running to use expansive excited utterance exceptions to prosecute criminal cases, *Crawford* does not. *Crawford* expressly rejects Wigmore's limited view of the confrontation right and demands of *all* testimonial statements "what the common law required." 541 U.S. at 50-51, 68. The common law precluded the admission of a victim's description of a completed crime to a governmental agent in the absence of a showing of unavailability and an opportunity to cross-examine. Consequently, so does the Confrontation Clause.

2. The Washington Supreme Court's majority also erred in reasoning that McCottry's identification of Davis was nontestimonial because "[t]here is no evidence that McCottry sought to 'bear witness' in contemplation of legal proceedings." App. 7. As the dissent and other courts have noted, *Crawford*'s "focus on reasonableness dictates an objective standard, evaluated by whether a reasonable person would 'expect [the statement] to be used prosecutorially,' not a subjective determination of whether the 911 caller actually knew his or her statement would be used prosecutorially." App. 8 (Sanders, J., dissenting) (quoting *Crawford*, 541 U.S. at 51-52); *see also, e.g., Cromer*, 389 F.3d at 675 (inquiry must be based on a "reasonable person in declarant's position").

Indeed, in countless areas of constitutional criminal procedure, this Court has shunned subjective inquiries in favor of objective standards. *See, e.g., Berkemer v. McCarty*, 468 U.S. 420, 430-31, 442 & n.35 (1984) ("in custody" requirement for Fifth Amendment's *Miranda* rule); *Rhode Island v. Innis*, 446 U.S. 291 (1980) ("interrogation" standard for Fifth Amendment's *Miranda* rule); *Florida v. Bostick*, 501 U.S. 429, 437 (1991) ("seizure" standard under Fourth Amendment). The reasons for favoring

objective standards – efficiency, certainty, and consistency – apply, if anything, with more force here. The very reason confrontation issues arise in the first place is because certain witnesses are not present to testify. The idea, therefore, that courts should estimate those witnesses' "perception[s] of [their] situation[s]" at the time they gave their out-of-court statements ignores a fundamental teaching of Crawford – that "[o]nly cross-examination could reveal [those perceptions]." 541 U.S. at 66.

What is more, the Washington Supreme Court's rule dividing 911 statements seeking help from danger from those seeking to "assist the police in investigation" sets up a demonstrably false dichotomy. The truth is that almost all 911 calls contain an element of each. The typical caller wants some kind of help and probably realizes she is making statements that might reasonably be used for investigative or prosecutorial purposes. Pretending, as the Washington Supreme Court does, that the spectrum of 911 calls – and the spectrum of statements within such calls – can be neatly divided between those that seek to get help and those that seek to trigger prosecutorial action invites judicial manipulation and idiosyncratic decision making – the very problems that plagued the *Roberts* framework. *Crawford*, 541 U.S. at 62-63; *see also Walker*, 697 N.W.2d at 170 (Cooper, J., dissenting) ("Determining whether a statement is testimonial in nature based on the declarant's state of mind is as amorphous as the reliability test of *Ohio v. Roberts*"; indeed, "it is merely a reliability analysis in disguise."); *United States v. Bordeaux*, 400 F.3d 548, 556 (8th Cir. 2005) (interview during forensic examination of victim that served both medical and law enforcement purposes was testimonial because "*Crawford* does not indicate, and logic does not dictate, that multi-purpose statements cannot be testimonial"). In this very case, in fact, the Washington Supreme Court majority did

nothing more than label McCottry's identification of Davis as "seeking assistance and protection from peril." App. 7. It never explained how identifying her alleged assailant could have furthered such purposes, and it ignored that McCottry specifically said she did *not* need an aid car. App. 25. Constitutional rights should not be so easily swept aside.

Employing an objective test – as Professor Richard Friedman, whose work this Court drew upon in *Crawford*, 541 U.S. at 61, advocates in his article applying the testimonial approach to 911 calls – would have forced the majority to grapple with several facts demonstrating that McCottry's statements were testimonial. "A reasonable person [who calls 911] knows she is speaking to officialdom – either police officers or agents whose regular employment calls on them to pass information on to law enforcement, from whom it may go to the prosecutorial authorities." Friedman & McCormack, 150 U. Pa. L. Rev. at 1242. It also is common knowledge that 911 calls are recorded and preserved for evidentiary purposes. App. 9 (Sanders, J., dissenting). This is especially so with respect to allegations that someone has engaged in criminal activity. Because "the contents of [such a] call are significant only as the caller's report of what has happened," they should be considered testimonial. Friedman & McCormack, 150 U. Pa. L. Rev. at 1243.

3. The final reason the Washington Supreme Court invoked to hold that McCottry's identification of Davis as her assailant was not testimonial – *i.e.*, that a 911 interview "is not of the same nature" as an *ex parte* examination, App. 5 – also misses the mark. When dealing, as here, with a type of out-of-court statement that did not exist at common law, it is useless to inquire whether the statement's descriptive characteristics mirror those of one of the particular abuses the Confrontation Clause meant to quell. *See*

Crawford, 541 U.S. at 52 n.3. The proper inquiry, grounded in the Framers' concern with guaranteeing an adversarial process, is a functional one: whether the statement that the accused is unable to challenge is being used at trial in a manner that "fulfills the function of prosecution testimony." App. 9 (Sanders, J., dissenting) (quoting Richard D. Friedman, *Grappling with the Meaning of "Testimonial,"* <http://www.personal.umich.edu/rdfrdman/Grappling1.pdf>, at 2 (2005)); *see also Arnold*, ___ F.3d at ___, 2005 WL 1431484, at *6.

There can be little doubt that McCottry's statements identifying Davis as her assailant satisfy this standard. The core function of prosecution testimony is to "establish[] or prove[] some fact," *Crawford*, 541 U.S. at 51 (quotation omitted) – ultimately, that a person committed a crime. McCottry's statements served exactly that function – so much so that the prosecutor told the jury in closing that "although Ms. McCottry is not here today to talk to you she left you something better. She left you *her testimony* on the day that this happened . . . th[at] shows that the defendant, Adrian Davis was at her home and assaulted her." Report of Proceedings (Sept. 5, 2001), at 55 (emphasis added). The Washington Supreme Court dismissed the prosecutor's characterization of McCottry's statements as irrelevant, App. 6, but at least one other court has held that a prosecutor's "colloquial" use of the word "testimony" to describe an absent witness's statements is a "a relevant factor in the calculus." *Stancil*, 866 A.2d at 814. At the risk of stating the obvious, such colloquial characterizations strongly suggest the proffered statements are serving the function of prosecution testimony.

This conclusion pertains, contrary to the Washington Supreme Court's suggestion (App. 5-6) and other courts' explicit statements (*e.g.*, *Corella*, 18 Cal. Rptr. 3d at 776),

regardless of whether a 911 operator's questioning "rise[s] to the level of an 'interrogation.'" *Id.* Nothing in *Crawford* limits the realm of testimonial statements to those produced during interrogations. To the contrary, *Crawford* says repeatedly that statements made during police interrogations are part of a class of "paradigmatic" or "core" testimonial statements, 541 U.S. at 52, 63, indicating that other types of statements also are testimonial. *See also id.* at 68 ("*Whatever else the term ['testimonial'] covers*, it applies *at a minimum* to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.") (emphasis added); *Lilly v. Virginia*, 527 U.S. 116, 137 (1999) (plurality opinion) (whenever "the government is involved in the statements' production and when the statements describe past events," the statements "implicate the core concerns of the old *ex parte* affidavit practice"). Indeed, *Crawford* also stated, without referring to any "interrogation" requirement, that the statements the alleged victim in *White* made "to an investigating police officer admitted as spontaneous declarations" were "testimonial statements." *Id.* at 58 n.8.

Neither the Washington Supreme Court nor any of the dozens of other appellate decisions from other jurisdictions – *not a single one* – holding that excited utterances to 911 operators or responding officers are not testimonial has even mentioned *Crawford*'s footnote concerning *White*, much less attempted to distinguish or reconcile it. It is impossible to know whether this collective silence is attributable to mere oversight or feigned ignorance. Regardless, it represents a rather extraordinary way to treat this Court's precedent. For once that footnote is absorbed, it is difficult to escape the conclusion that excited utterances like those at issue here are testimonial. *See, e.g.*, Lininger, 91 Va. L. Rev. at 773-82.

Lest there be any doubt, the police incident interview here, like "[m]ost 911 calls today" (App. 9 & n.5 (Sanders, J., dissenting)), was conducted according to a detailed script, designed to "obtain pertinent information" to facilitate a criminal inquiry, "such as where the incident occurred, what type of incident occurred, when the incident occurred, if weapons were involved, who was involved, why it occurred and the reporting party's information." App. 21; *accord Cortes*, 781 N.Y.S.2d at 405-07. The script generated, as the Washington Supreme Court put it, "*the information essential to the prosecution of this case*[,] McCottry's initial identification of Davis as her assailant." App. 5 (emphasis added). This degree of governmental involvement in producing the statements at issue is more than sufficient to trigger confrontation concerns. If prosecutors could try and convict defendants based solely on such 911 police incident interviews, the right to confrontation would be unable to serve its fundamental objective: requiring accusations of criminal conduct to be leveled in court proceedings, subject to adversarial testing.

Nor does it matter that 911 calls are "typically initiated by the victim." App. 5; *see also Spencer*, 162 S.W.3d at 882 (collecting other cases holding that "[i]nteraction with the police initiated by a witness or the victim is less likely to result in testimonial statements than if initiated by the police"). It has always been common ground that "the Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, *trials by anonymous accusers, and absentee witnesses*." *California v. Green*, 399 U.S. 149, 179 (1970) (Harlan, J., concurring) (emphasis added); *see also Bruton v. United States*, 391 U.S. 123, 138 (1968) (Stewart, J., concurring) (emphasis added) ("*[A]n out-of-court accusation* is universally conceded to be constitutionally inadmissible against the accused."). Whether or not a person's accusation that someone committed a crime is

prompted by the government has nothing to do with whether the defendant has the right to confront his accuser.

Indeed, a rule exempting "victim initiated" accusations from *Crawford*'s reach would produce outrageous results. It would mean that anytime a person called 911 – or the police or district attorney's office – and reported a crime, the caller's statements would not be testimonial. It also would mean that a person could go to a police station to report a crime and, so long as the police were previously unaware of its commission, the complainant's accusation (if blessed by local hearsay law) would be admissible against the accused regardless of whether the complainant appeared at trial. These are not fanciful possibilities. The Maine Supreme Judicial Court, for example, already has ruled that statements an alleged assault victim made upon driving to the police station to report the crime were not testimonial because "she went to the police station on her own, not at the demand or request of the police." *Barnes*, 854 A.2d at 211; *see also Marc v. State*, ___ S.W.3d ___, 2005 WL 1294969, at *10 (Tex. App. June 2, 2005) (Victims' statements describing crime were not testimonial because "the officers did not seek out the victims for the purpose of investigating the offenses the victims eventually described."). And appellate courts in New York and California have held that "excited utterances" at field "showups" were not testimonial because the victim identified the assailants "spontaneously" (after the police orchestrated the encounters). *Diaz*, ___ A.D. at ___, 2005 WL 1514448, at *4; *People v. Jimenez*, 2004 WL 1832719, at *11 (Cal. App. Aug. 17, 2004) (unpublished opinion). This Court should not tolerate such obfuscation of a "bedrock" constitutional right. *Crawford*, 541 U.S. at 42.

C. There Is A Pressing Need For This Court To Delineate The Scope Of *Crawford*'s Testimonial Principle, Especially In This Context.

This Court should not wait any longer before beginning to delineate the scope of *Crawford*'s testimonial principle. On the day *Crawford* was announced, the Chief Justice (joined by Justice O'Connor) stated:

> [T]he thousands of federal prosecutors and tens of thousands of state prosecutors need answers as to what beyond the specific kinds of "testimony" the Court lists is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner.

541 U.S. at 75-76 (Rehnquist, C.J., concurring in the judgment) (internal citation omitted).

Whether or not it would have been advisable in *Crawford* itself to expound further on the testimonial principle, the time unquestionably has come, over one year later, to commence that effort. "Courts across the country are churning out *Crawford*-related opinions at breakneck speed." Rene L. Valladares & Franny A. Forsman, Crawford v. Washington: *The Confrontation Clause Gets Teeth*, 12 Nev. Law. 12, 14 (Sept. 2004); *see also* Major Robert Wm. Best, *To Be Or Not To Be Testimonial?*, 2005 Army Lawyer 65, 87 (2005) ("Every week, at least twenty opinions are released that make a citation to *Crawford*."). The divergent views concerning how to analyze excited utterances describing criminal activity have been fully vetted and the conflicting rules are becoming increasingly entrenched. And the conflict has reached state high courts and federal appellate courts. *See supra* at 10-18. Further appellate percolation would consist of nothing more than choosing sides. *See, e.g., Greene*, 874 A.2d at 776 (recent Connecticut Supreme Court decision simply noting conflicting decision from Georgia

Supreme Court in a "*but see*" citation); *Ruth*, ___ S.W.3d at ___, 2005 WL 1431324, at *6 (treating conflicting authority same way).

The necessity of resolving the question presented here is particularly pressing because "a large number of jurisdictions" use the excited utterance exception, as the State of Washington did in this case, to conduct "victimless" (or "evidence based") prosecutions – that is, prosecutions that, instead of putting the alleged victim on the stand at trial, are "based largely on the admission of hearsay statements that a victim makes to 911 operators, police officers," and similar officials. Andrew King-Ries, Crawford v. Washington: *The End of Victimless Prosecution?*, 28 Seattle U. L. Rev. 301, 301, 309 (2005) (describing this practice in Washington and other states). Although prosecutions "rarely if ever" were conducted using absent victims' accusations before the advent of the *Roberts* framework, Friedman & McCormack, 150 U. Pa. L. Rev. at 1222-24, Washington and other states are maintaining they may do so even now that *Crawford* has abrogated *Roberts*. *See, e.g., Stancil*, 866 A.2d at 807 (describing prevalence of victimless prosecutions in District of Columbia in the course of addressing argument that they are still permissible); *People v. Moscat*, 777 N.Y.S.2d 875, 878 (N.Y. Crim. Ct. 2004) (same in New York City); Donna B. Bloom, Comment, *"Utter Excitement" About Nothing: Why Domestic Violence Evidence-Based Prosecutions Will Survive* Crawford v. Washington, 36 St. Mary's L.J. 717, 731 & n. 65, 751 (2005) (arguing that "*Crawford* has or should have no effect in Texas" with respect to basing evidence-based prosecutions on excited utterances). New cases are being filed and prosecuted in this mode every day – in domestic violence as well as in other types of cases. *See, e.g., State*

v. Williams, 2005 WL 120054, at ¶¶ 3-9 (Ohio App. 2005) (ordinary assault case); *Jimenez*, 2004 WL 1832719 (ordinary robbery case in California).

Consequently, several courts and commentators in this particular context have since echoed, and amplified, the Chief Justice's call for prompt guidance concerning the testimonial principle. *See, e.g., Hammon*, ___ N.E.2d at ___, 2005 WL 1406007, at *6 (judges "need answers" regarding *Crawford*'s reach); *Moscat*, 777 N.Y.S.2d at 877-78 (Chief Justice's concerns are, "[i]f anything, understated"); *Grace*, 111 P.3d at 37 (*Crawford*'s lack of a comprehensive definition of testimonial has left courts in a "quandary"); Won Sin, Comment, Crawford v. Washington: *Confrontation Clause Forbids Admission of Testimonial Out-of-Court Statements Without Prior Opportunity to Cross-Examine*, 40 Harv. C.R.-C.L. L. Rev. 223, 232 (2005) (Chief Justice's warning that the Court's decision would cast a mantle of uncertainty over future trials "is coming true before our very eyes" with respect to 911 calls); Mosteller, 39 Rich. L. Rev. at 608 (*Crawford* has created "great uncertainty" concerning victimless prosecutions); *The Supreme Court – Leading Cases*, 118 Harv. L. Rev. 248, 321 (2004) ("Equally as significant as the Court's holding, then, is what it failed to resolve," including the status of "911 phone calls"); Karan & Gersten, 13 Juvenile & Family Justice Today at 22 ("As Chief Justice Rehnquist noted in his concurring opinion in *Crawford*, the legal community needs answers to the hearsay problem now."); Best, 2005 Army Lawyer at 80 (testimonial principle "need[s] some simplification and clarification").

Delaying guidance regarding how *Crawford* applies to excited utterances describing criminal activity to governmental agents not only would prolong frustration in trial and appellate courts; it would impose serious costs on both prosecutors and

defendants. Prosecutors are maintaining in professional publications that they "must continue to argue that *Crawford* does not bar traditional evidence in evidence-based prosecutions." Adam M. Krischer, *"Though Justice May Be Blind, It Is Not Stupid": Applying Common Sense to* Crawford *In Domestic Violence Cases*, 38 Prosecutor 14, 16 (Nov./Dec. 2004) <http://www.ndaa-apri.org/publications/ndaa/toc_prosecutor.html>; *see also* Erin Leigh Claypoole, *Evidence-Based Prosecution: Prosecuting Domestic Violence Cases Without a Victim*, 39 Prosecutor 18, 21, 26 (Feb. 2005) (prosecutors must be "ready, willing, and able" to press ahead in evidence-based prosecutions and to argue against *Crawford* objections); Victor I. Veith, *Keeping the Balance True: Admitting Child Hearsay in the Wake of* Crawford v. Washington, 16 Update No. 12 (American Prosecutors Research Institute 2004) <http://www.ndaa-apri.org/publications/newsletters/update_volume_16_number_12_2004.html> ("*Crawford* specifically called into question the excited utterances made to a police officer in *White v. Illinois* that were in response to questioning. Keep in mind, though, that this language in *Crawford* is merely dicta. Prosecutors must be prepared to argue in future cases" that statements made in informal settings are not testimonial – "whether or not the statement [at issue] was made to an investigator."); King-Ries, 28 Seattle U. L. Rev. at 320-28 (former prosecutor arguing *Crawford* should allow the use of all accusations that satisfy modern excited utterance exception); Celeste E. Byrom, Note, *The Use of the Excited Utterance Hearsay Exception in the Prosecution of Domestic Violence Cases After* Crawford v. Washington, 24 Rev. Litig. 409, 428 (2005) ("[T]he prosecutor should argue that *Crawford*'s rule does not apply to excited utterances because (1) *Crawford* does not expressly overrule *White v. Illinois*, and (2) by definition, an excited utterance cannot be 'testimonial.'").

Accordingly, as soon as *Crawford* was announced, prosecutors began advising law enforcement agencies to "develop protocols for identifying and recording excited utterances" in "government-directed interview[s]." Murphy, 23 ABA Child Law Practice, *supra*, at 131; *see also* Wendy N. Davis, *Hearsay, Gone Tomorrow?*, 90 ABA Journal 22, 24 (Sept. 2004) (After *Crawford* was announced, prosecutors' offices "immediate[ly]" began "instructing officers to take notes of the victim's demeanor at the scene – such as 'she was screaming, she was crying' – to prove that the statement was an excited utterance and not the product of an interrogation."). One article in *Prosecutor* magazine emphasizes that "[o]ne of the most helpful pieces of evidence in an evidence-based prosecution is the 911 call of a scared, crying victim" and urges protocols including "training . . . the dispatchers who take 911 calls from domestic violence victims." Claypoole, 39 Prosecutor at 20.

Prosecutors also are developing their own protocols premised on a constricted reading of *Crawford*. A publication from the American Prosecutors Research Institute provides a detailed list of several "predicate questions" prosecutors should use to lay a foundation to "overcome a [*Crawford*] challenge to the introduction of excited utterances made by a victim to a police officer." Cindy Dyer, *Sample* Crawford *Predicate Questions*, 1 The Voice 8 (Nov. 2004) <http://www.ndaa-apri.org/pdf/the_voice_vol_1_issue_1.pdf>. Typical questions are: "Describe the victim's emotional condition at the time you were talking to her."; "Were your questions to her an interrogation or merely part of your initial investigation?"; "Were those questions asked in order to determine whether a crime had even occurred?"; and "At this time, did the victim make any statements to you that were not in response to any questions?" *Id.* at 8-

9; *see also* Byrom, 24 Rev. Litig. at 424-26 & n.86 ("[I]t is extremely important for a prosecutor to distinguish informal police questioning from the more formal questioning of police interrogation"). Some courts already have rested decisions upon such spoon-fed testimony. *See, e.g., Hembertt*, 696 N.E.2d at 479 (noting that officer "agreed" with prosecutor's suggestion that the victim's statement to him "was not in response to a question that [he] or another officer asked"); *Marc*, ___ S.W.3d at ___, 2005 WL 1294969, at *10 ("The officers' testimony indicates that each one asked questions of a lone, visibly upset female . . . in an attempt to determine the reason for her emotional state."); *cf. Hammon*, ___ N.E.2d at ___, 2005 WL1406007, at *11 (affidavit victim filled out at the scene testimonial but oral statements made to officer minutes before nontestimonial because the officer at that time "was essentially attempting to determine whether anything requiring police action had occurred").

It comes as no surprise that criminal defense lawyers are urging precisely the opposite approach. Public defenders are asserting that *Crawford* "shut down" prosecutors' ability to bring evidence-based prosecutions based on 911 calls or statements to responding officers. David Feige, *Domestic Silence: The Supreme Court Kills Evidence-Based Prosecution*, Slate, Mar. 12, 2004 <http://slate.msn.com/id/2097041>; *see also* Valladares & Forsman, 12 Nev. Law. at 14 ("witness statements to investigating officers are typically testimonial as they are generally given for evidentiary purposes"). Several law professors have echoed this assessment: "If [under *Crawford*] we are to imagine the Framers' reaction to practices that did not exist at the time, we could imagine few practices that would have been more abhorrent to their values than [victimless prosecutions]." Mosteller, 39 U. Rich. L. Rev. at 607-08 & n.548; *see also*

Lininger, 91 Va. L. Rev. at 776, 781 (under *Crawford*, "911 calls appear to be a precarious basis for 'evidence-based' prosecutions," and "prosecutors will take a tremendous risk if they continue to stake 'evidence-based' prosecutions on hearsay statements to responding officers"); Andrew Siegal, *Court Is Adjourned – What Have We Learned?*, 16 S. Carolina Lawyer 14, 20 (2004) (evidence-based prosecutions "almost certainly" unconstitutional under *Crawford*); Edward J. Imwinkelried, *The Treatment of Prosecution Hearsay Under* Crawford v. Washington: *Some Good News But* . . . , 28 The Champion 16, 18 (Sept./Oct. 2004) ("prosecutors will be unable to generalize all . . . 'excited utterances' . . . as automatically nontestimonial"); Best, 2005 Army Lawyer at 86 ("Whether there is a constitutional difference between a preliminary investigation and a later investigation is a dubious distinction at best.").

Until this Court resolves this issue, the only thing prosecutors and defenders will agree upon in the hundreds or thousands of cases across the country raising it is that the issue is critically important. *See* Leonard Post, *Prosecutors Feel Broad Wake of 'Crawford,'* 27 Nat'l L.J. No. 15, Dec. 13, 2004, at 1 (discussing uncertainty regarding inadmissibility of 911 calls); Allie Phillips, *Weathering the Storm After* Crawford v. Washington, 17 Update No. 6 (American Prosecutors Research Institute Nov. 6, 2004) ("Since *Crawford*, the firmly rooted hearsay exception of excited utterance has been the most discussed and controversial of all hearsay exceptions."); Dennis J. Opatmy, Crawford *Ruling Affirms Confrontation Clause*, L.A. Daily J., Apr. 14, 2004, at 1 (prosecutors and defense lawyers "agreed that one of the key issues is whether spontaneous statements, or 'excited utterances,'" made to governmental officials are testimonial); Neil P. Cohen & Donald F. Paine, Crawford v. Washington: *Confrontation*

Revolution, 40 Tenn. Bar J. 22 (May 2004) (lamenting the "disturbing uncertainties" over whether excited utterances reporting recent criminal activity are testimonial); John Council, *The* Crawford *Questions*, Law.com, July 2, 2004 <http://www.law.com/jsp/article.jsp?id=1088138437273> (describing disputes between prosecutors and defense lawyers in pending cases involving "excited utterances victims make to police officers" and to 911 operators); Byrom, 16 Rev. Litig. at 419 ("Until a more precise definition is pronounced, prosecutors will be left scratching their heads over whether a victim's statement is testimonial and, therefore, subject to *Crawford*'s requirements.").

All the while, the uncertainty concerning *Crawford*'s reach is increasingly threatening core constitutional values. Perhaps most pointedly, the question whether excited utterances alleging criminal conduct are testimonial controls not merely whether prosecutors may use such statements when declarants become unavailable for trial; it determines whether prosecutors even have an obligation to try to produce such accusers at trial in the first place. This Court held in *White v. Illinois* that states may introduce out-of-court "excited utterances" against criminal defendants regardless of whether the declarant has been shown to be unavailable for trial. 502 U.S. at 355-58; *see also, e.g.*, Fed. R. Evid. 803(2) (unavailability not required under excited utterance exception); Wash. R. Evid. 803(a)(2) (same). Taking the subsequent holding in *Crawford* into account, this means that if excited utterances to governmental agents are not testimonial, states may use them to convict a defendant regardless of whether they even try to secure the accusers' live testimony. Police and prosecutors will lack any incentive to do what the Confrontation Clause, not to mention due process in general, urges: finding witnesses and calling them at trial, so juries can observe them in an adversarial setting.

Furthermore, the finality of innumerable criminal convictions depends on resolving the question presented. A cloud of potential constitutional error hangs over every new guilty verdict obtained under the assumption that *Crawford* allows victims' excited utterances alleging criminal conduct to be used in the place of live testimony subject to cross-examination. The sooner this Court decides this issue, the fewer cases may need to be retried. And the sooner this Court clarifies *Crawford*'s scope in the context of governmental interviews conducted shortly after crimes have occurred, the sooner prosecutors and trial judges can adjust their practices to ensure in future trials that defendants are not deprived of a fundamental constitutional guarantee.

D. This Case Is An Excellent Vehicle For Clarifying The Scope Of The Testimonial Principle.

For three reasons, this case is an excellent vehicle for this Court to resolve the conflict over *Crawford*'s application to statements reporting recent criminal activity to governmental agents, as well as to begin the more general enterprise of clarifying the boundaries of the testimonial principle.

1. There are no procedural impediments to reaching the question presented. The case is on direct review, and Petitioner has contested the admissibility of McCottry's responses to the 911 operator's questions at every stage of the proceedings. The Washington Supreme Court applied *Crawford* to the facts of the case without noting any procedural problems, giving this Court a clean appellate opinion to review.

2. As is ordinarily the case in "victimless prosecutions," Davis' conviction stands or falls on the applicability of *Crawford*. The prosecutor told the trial judge that this is "a typical case involving domestic violence" because "the evidence . . . is very minimal, and it comes down to credibility issues between one of three people or potentially two

people[,] meaning the complaining victim and the defendant." Report of Proceedings (Sept. 4, 2001) at 44. Yet the State was never required to make any effort to produce the victim to take the stand. Davis was never able to ask a single question of his accuser. This case thus places the consequences of condoning victimless prosecutions for confrontation law – and for the adversarial process in general – in stark relief.

The dissent, in fact, expressly found that "[g]iven that there was no evidence introduced at trial other than the 911 tape which showed that Davis assaulted McCottry or violated the no-contact order, the admission of the 911 tape was not harmless." App. 11 (Sanders, J., dissenting). The majority never suggested otherwise.

3. More generally, the excited utterance issue here is an excellent one to begin elaborating the meaning of "testimonial" because the issue arguably cuts across the *Crawford* opinion's three potential formulations of the term. *See, e.g.*, Best, 2005 Army Lawyer at 79 ("The[] 911 phone call cases point to the difficulty courts are having in the absence of a comprehensive definition of testimonial."). One of those formulations requires statements to be made in a "formalized" setting to be testimonial, while the other two do not. *See Crawford*, 541 U.S. at 51-52; *Greene*, ___ A.2d at ___, 2005 WL 1384052, at *16 & n.16 (elaborating on this difference). Not surprisingly, therefore, some courts have held that a statement must be "formal" to be testimonial, while some have held it need not be. *Compare Cage*, 15 Cal. Rptr. 3d at 856 ("a hearsay statement is not testimonial unless it is made in a relatively formal proceeding that contemplates a future trial"); *Mungo*, 393 F.3d at 336 n.9 (requiring "formality, command, and thoroughness") (quotation omitted); *with Cromer*, 389 F.3d at 674 (rejecting argument that testimonial principle applies "only in the instance of formalized statements"); *and*

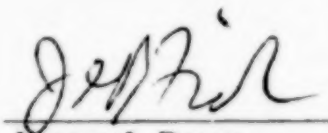
Kilday, 20 Cal. Rptr. at 173 ("an interpretation of *Crawford* that makes the presence or absence of indicia of formality determinative is inconsistent with [the decision]").

What is more, even courts and commentators within the group requiring formality disagree over exactly what constitutes formality. Some limit the concept to stationhouse interrogations while others extend it to 911 calls and field interviews with responding officers. *Compare King*, ___ P.3d at ___, 2005 WL 170727, at *6; (statement to responding officer in field interview lacks "indicia of formality"); *People v. Lugo*, 2004 WL 2092018, at *8 (Cal. App. 2004) (unpublished opinion) (a police invitation at the scene for alleged victim to tell story involves "no formality at all"); *Corella*, 18 Cal. Rptr. 3d at 776 (statements in 911 call "bear no indicia common to the official and formal quality of the various statements deemed testimonial in *Crawford*"); *with Stancil*, 866 A.2d at 810, 813 (*Crawford* requires "some level of structure or formality" but field interviews immediately after incident satisfy that test); *Lopez*, 888 So.2d at 700 (statement to a responding officer constitutes "a formal report of the incident"); *Cortes*, 781 N.Y.S.2d at 406 ("The procedures in connection with 911 calls meet the definition of formal."). Resolving the conflict here would sort out whether some degree of "formality" is necessary to trigger *Crawford*, and, if so, what that concept means. The lower courts cannot settle this issue themselves.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 8th day of July, 2005.



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IN THE SUPREME COURT OF THE UNITED STATES

ADRIAN MARTELL DAVIS,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE WASHINGTON SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

OCT - 4 2005

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QUESTION PRESENTED

Whether the recorded telephone call of a domestic violence victim to a 911 call-receiving center immediately after the victim had been assaulted is a "testimonial" statement pursuant to Crawford v. Washington, 541 U.S. 36 (2004).

OPINIONS BELOW

The opinion of the Washington Supreme Court is attached to Davis' petition for writ of certiorari. Pet. App. at 1-11. The opinion of the Washington Court of Appeals is also attached to Davis' petition. Pet. App. at 12-20.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

For purposes of this response, the facts of the case are adequately set forth in the opinions of the Washington Supreme Court and the Washington Court of Appeals. See Pet. App. at 3 and 14.

REASON THE PETITION SHOULD BE DENIED

The State does not dispute that there is some disagreement among State and Federal appellate courts over the proper interpretation of Crawford v. Washington. But the State does dispute the claim that this case is the best vehicle to further develop the constitutional analysis announced in Crawford.

The need for some additional measure of guidance does not mandate granting review in the first few cases to appear on this Court's docket, simply in an effort to say more now than was said in Crawford. Instead, the State respectfully asks this Court to deny the petition for certiorari in this case, and others like it, and await a case wherein the trial court record was *fully* developed after Crawford was decided. In such a case, the trial lawyers will have marshaled their facts and framed their arguments in light of Crawford, and the trial court will have issued its ruling with the new confrontation clause analysis in mind. Such a case will likely be presented in the near future, as the Crawford decision was released nearly nineteen months ago.

If this Court were to grant review in this case, however, such review should be conducted based on the record available to the trial court, not on appendices supplied by Davis, and any factual review should be done with due deference to the trial court's factual determinations.

Certiorari is selectively granted only for compelling reasons, "and rarely when the asserted error consists of erroneous factual findings..." Sup. Ct. R. 10. This Court, as a court of law and not a court for the correction of error, should not review a lower court's findings of fact in the absence of a very obvious and exceptional showing of error. Graver Mfg. Co. v. Linde Co., 336 U.S. 271 (1949). Appellate courts are ill-equipped to make factual determinations. See Maryland v. Louisiana, 451 U.S. 725, 761-62 (1981) (Rehnquist, J., dissenting) (noting that this Court's original jurisdiction should be sparingly invoked because such jurisdiction often places the Court in the awkward role of fact finder); Anderson v.

Bessemer City, 470 U.S. 564, 574-75 (1985) (reversing federal appellate court's application of "clearly erroneous" standard as to factual findings of district court). And the appellate court's role as fact finder is even more awkward when the legal framework changed after the trial court's factual record was developed.

Although the Davis case arguably presents legal issues arising after Crawford, resolution of those legal issues is intertwined with factual issues never developed below. More importantly, Davis' request for relief would require this court to make factual determinations inconsistent with those made by the trial court. For instance, Davis offered no evidence at the trial court, in the intermediate appellate court, or in the Washington Supreme Court, to show that 911 operators interrogate people who call for assistance. In fact, Davis likely assumed, as would most people, that 911 calls are not interrogations, even under the broadest or most colloquial definition of that term.

Yet, in the Washington State Supreme Court, amicus Washington Association of Criminal Defense Lawyers (WACDL) attempted to supplement the record with selected documents from the 911 call center's internal operations manual.[1] WACDL argued, and Davis now argues in his petition for a writ of certiorari, that because those documents used the term "police incident interview" in association with 911 calls, conversations between caller and

[1] The State objected to reliance on these excerpts because they had never been a part of the record before the trial court, and because the State disagreed with the manner in which certain quotations were characterized. In the alternative, however, the State asked the Washington Supreme Court to consider additional excerpts showing that representations drawn from Davis' excerpts were incorrect. The Washington Supreme Court never expressly ruled on whether the materials should be considered, but the court's opinion did not rely on such materials. Pet. App. at 1-8. The dissent, by contrast, cited to the extra-record material to draw an inference adverse to the State's position. Pet. App. at 9 n.5.

operator are similar to interrogations, thus making statements to 911 operators akin to statements obtained under "police interrogation." Pet. at 19. These "facts" fill nearly the entire first page of Davis' statement of the case, and Davis invites this Court to draw inferences from such "facts" even though they were never adduced at trial. Pet. at 2, 19.

Had this trial occurred post-Crawford, however, these issues could have been litigated, and the trial court could have made informed factual findings on the nature and purpose of the 911 operator's duties. But since this essentially factual argument was raised for the first time on appeal, by an amicus, the record simply cannot support it.[2] Thus, either this Court must defer to the factual rulings of the trial court, which do not include any finding that 911 operators are conducting interrogations, or this Court must make its own factual findings in this regard, based upon nothing but an appendix to a petition or brief. This is fundamentally inconsistent with the role of an appellate court, much less this Court's jurisprudence in granting certiorari.

Similarly, under many interpretations of Crawford, the declarant's state of mind plays *some* role in determining whether a statement is testimonial.[3] As to

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[2] The record is also silent as to the precise employment status of 911 operators, specifically whether they are police officers or detectives. Such a claim seems implausible, and Davis appears not to make that claim.

[3] Whether the inquiry is subjective or objective is debated. While Davis advocates an "objective" test, it is not clear from his pleadings whether he supports an "objective" test that acknowledges the caller's dire situation (i.e., the reasonable person in the caller's shoes), or an "objective" test drawn from a detached, academic perspective, entirely divorced from the caller's actual circumstances (i.e., a theoretical reasonable caller who "realizes" in some abstract sense, that her statement could be used in court). Moreover, it has been argued that the import of this subjective / objective distinction is slight, in that either test will yield similar results; but it has also been argued that the distinction is significant, with "enormous practical implications." Compare Richard Friedman & Bridget McCormack, Dial In Testimony, 150 U. Pa. L. Rev. 1171, 1240 (arguing that either test would "yield[ ] similar results") with Hammon v. Indiana, Docket No. 05-

Ms. McCottry's state of mind, the trial court necessarily found that she called 911 immediately after a startling event, while under the influence of that event, without an opportunity to fabricate, and without reflection. That conclusion was based on the trial court's listening to the 911 tape, in which the tone, volume, and inflection of Ms. McCottry's voice can be assessed.[4] The trial court's findings were also influenced by the testimony of the two responding police officers, who found Ms. McCottry panicked, in the company of her small children, rushing around the house trying to gather her belongings to flee the residence, with what appeared to be fresh damage to a wall, and with a ripening bruise on Ms. McCottry's face. Pet. App. at 3.

The Washington Supreme Court also listened to the 911 tape and reviewed the record. It, too, concluded that Ms. McCottry's call was a cry for police intervention rather than an attempt to create evidence.[5] Pet. App. at 6-7. Both courts were likely also influenced by the fact that Ms. McCottry did not wish to assist the responding police officers, and that she refused to sign a statement

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5705, Petitioner's Reply Brief in Support of Petition for Writ of Certiorari at 3 (arguing that "The difference...has enormous practical implications."). If a factual finding on the caller's state of mind bears such legal significance, the trial court's assessment of the evidence is surely entitled to great weight.

[4] The 911 call was played at oral argument before the Washington Supreme Court and may be heard at the archived arguments section of the website. *See* Washington Supreme Court oral argument (Sept. 19, 2004), *audio recording by* TVW, Washington State's Public Affairs Network, *available at* http://www.tvw.org. The tape-recording of the 911 call is played at 52:40. The archived argument should be accessed through Real Player, as the recorded 911 call is inaudible using Microsoft Windows Media Player

[5] Amici Washington Public Defenders and National Association of Criminal Defense Attorneys unfairly characterize the Washington Supreme Court's decision as based on mere guesswork. Br. of Amici at 3, 9 (claiming that the court simply "surmised" that Ms. McCottry's call was a cry for help, and later characterizing the conclusion as "supposition" as to her state of mind). The court's decision was not simply guesswork, but rather was based on reasonable conclusions from the evidence.

for their report, and even attempted to shield her face when they tried to photograph her injuries. Pet. App. at 14. The conclusions of the trial court and the Washington Supreme Court are simply inconsistent with the finding Davis now asks this Court to make -- that Ms. McCottry intended, or knew in some meaningful sense, that her 911 call would be used months hence as evidence in a court of law to prove some fact.

Moreover, while testimony bearing on these questions might have been elicited post-Crawford, none was elicited here. For instance, the State might have elicited testimony in a pretrial hearing from the responding officers regarding the number of times each has encountered victims or witnesses who seem completely oblivious to the fact that their 911 call was recorded and could be used in court absent their testimony. Such testimony might even have been available from the responding police officers in this case vis-à-vis Ms. McCottry's apparent state of mind or awareness of subsequent legal proceedings. The State could also have elicited testimony from domestic violence advocates as to whether, in their experience, domestic violence victims understand how and when ex parte statements may be used under the hearsay rules or under the Confrontation Clause.

Conversely, defense counsel might have been able to show, through evidence of past cases, and/or past participation in the legal system, that Ms. McCottry *actually* understood that a call to police would initiate a police response, a prosecution, and a conviction based on her ex parte statements. Had a record been developed post-Crawford, such matters could have been explored, and the

trial court would have had the facts necessary to rule. But this Court should be wary of making such factual findings based on very general assertions about a body of knowledge that is alleged to exist in the populace concerning the detailed workings of the rules of evidence, and about constitutional criminal procedure. See Pet. App. at 24-25.

CONCLUSION

Lower courts will be best served by granting review in a case with a fully developed factual record decided post-Crawford. A case tried before Crawford is a weaker vehicle for clarifying Crawford because such a case necessitates an appellate court to make both factual and legal determinations on a factual record that was not developed with the appropriate analysis in mind. For these reasons, Respondent respectfully requests that this Court deny the petition for writ of certiorari. If certiorari is granted, the State respectfully asks that review be limited to the record developed at trial, and that deference be given to the trial court's factual determinations.

DATED this 29th day of September, 2005

RESPECTFULLY submitted,

NORM MALENG
King County Prosecuting Attorney

By: _____
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CERTIFICATE OF SERVICE

I, James M. Whisman, a member of the bar of this Court, hereby certify that on this 29th day of September, 2005, I caused to be mailed first class postage prepaid, a copy of the Respondent's Brief in Opposition in the above-entitled case, to Ms. Nancy Collins, counsel for Petitioner Adrian Martell Davis, the respondent herein, at the Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, Washington, 98101. I also served a copy of the same document on Mr. Jeffrey L. Fisher, counsel for Petitioner, at Davis, Wright, Tremaine LLP, 2600 Century Square, 1501 Fourth Avenue, Seattle, Washington, 98101-1688.

I further certify that all parties to be served have been served.

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No. 05-5224

IN THE
SUPREME COURT OF THE UNITED STATES

ADRIAN MARTELL DAVIS,

Petitioner

v.

STATE OF WASHINGTON,

Respondent.

On Petition for Writ of Certiorari to the
Washington Supreme Court

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The State's response to the petition for certiorari is a microcosm of the way prosecutors' offices across the country have met this Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004): by kicking up dust. The State does not dispute that this Court's criteria for certiorari are met – this case unquestionably presents an important question of federal law – or even seriously defend the decision below; instead, the State manufactures and discusses numerous factual topics that have no relevance to the legal question at hand. Once these obfuscations are cleared away, it is plain that this Court should grant certiorari here. The pressing issue whether *Crawford* applies to accusations made to 911 operators should be resolved now – not years from now – and this case is an excellent vehicle for doing so.

A. The Conflict Over Whether "Excited Utterances" Describing Recent Criminal Activity To Governmental Agents Are Testimonial Continues To Deepen.

The State acknowledges that federal and state courts are divided over whether "excited utterances" to governmental agents describing recent criminal activity are testimonial. *See* Br. in Opp. at 1. In fact, after the petition for certiorari was filed, the Minnesota Supreme Court issued an opinion describing the three-way legal conflict exactly as the petition does: (1) some courts hold that such statements always are nontestimonial; (2) others analyze such statements on a case-by-case basis; (3) and still others hold that such statements are always testimonial. *See State v. Wright*, 701 N.W.2d 802, 810-11 (Minn. 2005).

What is more, during the three months since the petition for certiorari was filed, the split has deepened significantly, with new courts adopting all of these different approaches. The Eighth Circuit has adopted the first approach. *See United States v.*

Brun, 416 F.3d 703, 707-08 (8th Cir. 2005) (911 call and a statement to responding officers "were . . . excited utterances, and therefore nontestimonial statements").

The Minnesota Supreme Court, the North Carolina Supreme Court, and the Wisconsin Court of Appeals have adopted variants of the second approach. *See Wright*, 701 N.W.2d at 811 (911 calls, absent "an exceptional occasion," are nontestimonial; eight-factor test determines whether statements to responding officers are testimonial); *State v. Lewis*, ___ S.E.2d ___, 2005 WL 2467053, at *11-16 (N.C. Oct. 7, 2005) (adopting "case-by-case" approach under which police motives and objective declarant's state of mind are scrutinized; police's "initial gathering of information and determination of whether a crime has been committed" cannot produce testimonial statements); *State v. Hemphill*, 2005 WL 2139376, at ¶ 11 (Wis. App. Sept. 7, 2005) (publication decision pending) (case-by-case approach; statement to responding officers identifying assailant nontestimonial).

The Tenth Circuit and the Massachusetts Supreme Judicial Court have adopted the third approach, and the Kentucky Supreme Court has assumed that approach is correct. *See United States v. Summers*, 414 F.3d 1287, 1300-03 & n.9 (10th Cir. 2005) (adopting Sixth Circuit's holdings on subject; interview at scene of a "felony stop" testimonial); *Commonwealth v. Gonsalves*, 833 N.E.2d 549, 555-59 (Mass. 2005) (adopting Sixth Circuit's holdings on subject; statements obtained during "preliminary fact gathering and assessment whether a crime has taken place" are "per se testimonial"); *Bray v. Commonwealth*, ___ S.W.3d ___, 2005 WL 2317014, *2-3 (Ky. Sept. 22, 2005) (accepting and applying Sixth Circuit's approach to excited utterances but finding

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statement nontestimonial because made to declarant's family member prior to any crime occurring).

Finally, the Third Circuit has adopted the second approach for statements in 911 calls and the third approach for statements to responding officers. *See United States v. Hinton*, ___ F.3d ___, 2005 WL 2218919, *5-6 (3d Cir. Sept. 14, 2005) (911 calls were not testimonial; statement to investigating officers was testimonial).[1]

One additional academic has weighed in as well, asserting that the third approach is the correct one. *See* Myrna S. Raeder, *Domestic Violence, Child Abuse, and Trustworthiness Exceptions After* Crawford, 20 Crim. Just. 24, 29 (Summer 2005) (under proper conception of *Crawford*, statements in 911 calls giving "the identity of the perpetrator or any information obtained as a result of questioning by the 911 operator would be viewed as testimonial").

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[1] The Third Circuit's decision supports the suggestion in the *amicus* brief filed by the Public Defender Service for the District Columbia and the NACDL that even if this Court grants certiorari in a case involving a statement to a responding officer, it also should grant certiorari in this case to give comprehensive guidance in this area of law. Although most courts have held that accusatory "excited utterances" to responding officers should be treated the same as those to 911 operators, some courts like the Third Circuit have suggested that even if statements to responding officers are testimonial, statements to 911 operators are not, or may not be. *See, e.g., People v. Packard*, 2005 WL 1745329, *4-5 (Cal. App. July 26, 2005) (not officially published) (not deciding whether statements to a responding officer were testimonial because 911 call was not testimonial and contents of that call were the same as the interview with the responding officer); *Pitts v. State*, 612 S.E.2d 1, 4-5 (Ga. App. 2005) (noting that state supreme court held statements to investigating officers are categorically "testimonial," but holding nonetheless that "911 calls . . . do not come within the ambit of *Crawford*"); *Wright*, 701 N.W.2d at 811-12 (analyzing statement to responding officer somewhat differently than 911 call). Because both kinds of statements are central to the modern practice of victimless prosecutions – and because so many state courts already have demonstrated, by limiting *Crawford*'s reach to police "interrogations," that they intend to read this Court's decisions in this area as limited strictly to their facts – this Court should not leave the status of accusatory statements in 911 calls unresolved.

In sum, there can be no doubt that the law in this area is in utter disarray. This Court is the only institution that can halt the escalating disorder.

B. There Is Nothing To Gain, And Much To Lose, By Delaying Consideration Of This Issue.

The only real argument the State advances in its opposition is that this Court should "deny the petition for certiorari, and others like it, [to] await a case wherein the trial court record was *fully* developed after *Crawford* was decided." Br. in Opp. at 2. The State does not point to any such case involving a 911 call pending in this Court, or even in any state supreme court or federal court of appeals. Nor is Petitioner aware of any. It is important, therefore, to understand what the State's request entails: Because a petition for certiorari must be filed in this Court by this November in order for the case to be heard this Term, the State is asking this Court to delay ruling on whether *Crawford* applies to accusations like the one here until the October 2006 Term, at the earliest. This would generate – again, at the earliest reasonable date – a decision on the issue by the winter of 2007, about one and one-half years from now.

Lower courts, defendants, police, and prosecutors cannot wait that long. The petition for certiorari details the frenetic pace at which courts are issuing *Crawford*-related decisions and the ways in which prosecutors already are creating protocols designed to exploit some courts' suggestions that "excited utterances" to governmental agents are not testimonial. *See* Pet'n for Cert. at 30-38. There simply are too many criminal convictions and future prosecutions at issue to delay at least defining the term "testimonial" and bringing some semblance of order to this area of law. *See id.*; *Gonsalves*, 833 N.E.2d at 575 (Sosman, J., concurring in part) ("As illustrated by the ever-increasing number of cases addressing confrontation clause issues in the wake of

Crawford, this is not an academic debate, but an issue of tremendous pragmatic consequence to the trial of criminal cases."); Raeder, *supra* page 3, at 27 (urging Supreme Court to take "a case in which it could clarify" *Crawford*'s application to excited-utterance accusations, because "uniformity is nowhere to be found"); Ralph Ruebner & Timothy Scahill, Crawford v. Washington, *The Confrontation Clause, and Hearsay: A New Paradigm for Illinois Evidence Law*, 36 Loy. U. Chi. L.J. 703, 775 (2005) ("One particularly troublesome area . . . is 911 calls. There is currently a disagreement among courts as to where 911 calls fit into *Crawford*'s framework.").

Indeed, when this case was in the Washington Supreme Court, the State requested an expedited oral argument, explaining that "[t]he decision in this case may impact hundreds of rulings in the district courts and the superior courts" in Washington alone. *See* Reply App. (attached to this brief) at 1. Extrapolating from the State's representation, the issue presented here may impact tens of thousands of criminal cases across the country.

The State, however, now belittles the glaring need for prompt review, asserting that this Court should turn its back on the escalating disorder in the lower courts because of two supposed deficiencies in this case's factual record: (1) the lack of evidence concerning whether "911 operators *interrogate* people who call for assistance" (emphasis added); and (2) the lack of evidence concerning the alleged victim's subjective state of mind when she told the 911 operator that Petitioner assaulted her. Br. in Opp. at 3-6 (emphasis added). The State never contended in the Washington Supreme Court that either of these topics – or any other – might require development in order to resolve completely the *Crawford* issue here, even though the Washington Rules of Appellate

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Procedure specifically provide for limited factual certifications to lower courts when "additional proof of facts is needed to fairly resolve the issues on [appellate] review" and "it would be inequitable to decide the case based solely on the evidence already taken in the trial court." Wash. R. App. P. 9.11. Nor does either supposed deficiency impede effective review now.

1. Whether 911 operators conduct "interrogations" is an artificial and irrelevant question. As the petition for certiorari explained, nothing in *Crawford* requires an interaction with a governmental agent to constitute an "interrogation" for it to produce testimonial statements. *See* Pet'n for Cert at 27-29; *see also Summers*, 414 F.3d at 1302-03 (statement testimonial even though declarant was not subject to "formal interrogation"). Even among the courts that erroneously have imposed an "interrogation" requirement, not a single one has suggested that evidence beyond that developed at a pre-*Crawford* trial was needed to resolve *Crawford*'s application to a 911 call. *See, e.g.*, Pet. App. 4-7; *Wright*, 701 N.W.2d at 811; *Ruth v. State*, 167 S.W.3d 560, 569 (Tex. App. 2005); *Leavitt v. Arave*, 383 F.3d 809, 830 n.22 (9th Cir. 2004); *People v. Corella*, 18 Cal. Rptr. 3d 770, 776 (Cal. App. 2004); *People v. Cortes*, 781 N.Y.S.2d 401, 415 (N.Y. Sup. Ct. 2004). All that is needed is the recording and transcript of the 911 call at issue.

The policy manual for the 911 call center that handled the police incident interview in this case, which the State expends so much energy discussing, does nothing more than provide background information for assessing the call itself. Parts of the manual, which is a public document, were attached to properly filed briefs in the Washington Supreme Court – both an *amicus* brief and a brief filed by the State – and that court considered them. *See* Pet. App. 9 (Sanders, J., dissenting); *see also* App. 6

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(addressing arguments in *amicus* brief).[2] The manual, thus, is part of the state court record that this Court may consider. And even if that public document had not been submitted to the court below, it is well established that this Court may "take judicial cognizance of all matters of general knowledge," *Muller v. Oregon*, 208 U.S. 412, 421 (1908), when crafting legal rules that will apply beyond the facts of a particular case. Such is the situation here; both Petitioner and the State frame the question presented in generic terms, and neither contends (for it would be silly to do so) that the issue whether an accusation to a 911 operator is testimonial depends on the attributes of any particular 911 system or any particular operator's conception of her duties. The policy manual here is simply an illustration of the general common knowledge concerning how 911 systems operate. *See, e.g., Gamble v. State*, 831 N.E.2d 178, 183 (Ind. App. 2005) ("911 calls are subject to established procedures"); *Cortes*, 781 N.Y.S.2d at 406 ("There is a regularized routine to the 911 calls in which crimes are reported.").

2. Whether the alleged victim here subjectively expected or intended her statements to be used prosecutorially likewise is irrelevant to this case. *Crawford* indicates – and all analogous areas of criminal procedure hold – that inquiries concerning

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[2] After this Court decided *Crawford*, the Washington Supreme Court called for supplemental briefing on whether the statements in the 911 call here were testimonial. Petitioner and the State filed simultaneous briefs, then WACDL filed an *amicus* brief, then the State filed another brief answering WACDL's brief. Contrary to the State's suggestion (Br. in Opp. at 3 n.1), it never filed any objection to the *amicus* brief's inclusion of pages from the manual in its appendix. The State merely included one footnote in its 24-page answering brief expressing some "doubt[]" as to whether the manual's status as a public document sufficed, in and of itself, to allow the Washington Supreme Court to consider it. Reply App. 3 (State's Answer to Brief of *Amicus* WACDL at 17 n.8). But instead of asking the Court to strike or disregard the *amicus* brief's appendix, the State simply requested that the Court "consider the related materials attached to [its] brief," consisting of other pages from the manual, if it considered the pages attached to the *amicus* brief. *Id.* In the event this Court grants certiorari, the State, of course, will be free to cite to any material in those same additional pages.

people's expectations are done on a strictly objective basis. *See* Pet'n for Cert. at 23-25; *accord Summers*, 414 F.3d at 1302. The State does not suggest any reason to depart from that rule here. Indeed, it is particularly wrongheaded to speculate on the alleged victim's state of mind when the very premise for having to do so is that the State did not produce her to testify at trial. The Washington Supreme Court majority's eagerness to undertake such an unknowable and manipulable inquiry goes to the heart of its legally erroneous analysis. *See* Pet'n for Cert. at 23-25.

This is not to say, of course, that the trial court had no warrant to determine whether the alleged victim's answers to the 911 operator's questions qualified as "excited utterances" under the Washington Rules of Evidence. *See* Br. in Opp. at 5. But the trial court's evidentiary ruling that they did so qualify does not remotely suggest, as the State would have it, that Petitioner is asking this Court to make any "finding" that is "inconsistent" with the trial court's ruling. Br. in Opp. at 5-6. Rather, the trial court's ruling – and the evidence produced at the pre-trial hearing leading to it – merely frame the issue in this Court: whether an "excited utterance" to a 911 operator accusing someone of a crime is a testimonial statement under the Confrontation Clause. *See* Pet'n for Cert. at i. In other words, Petitioner accepts that the victim's statements to the 911 operator qualified as "excited utterances" under state law; the question for this Court is whether being "under the stress of excitement caused by [an] event or condition," Wash. R. Evid. 803(a)(2), can deprive a declarant's accusatory statement to a governmental agent of testimonial status. *See* Pet'n for Cert. at 23-25.

All of the facts this Court needs to decide *that* issue are spelled out in the Washington Supreme Court opinion. A person told a 911 operator that Petitioner had just

committed a crime against her. App. 3. That person did not take the witness stand at trial. App. 3. Yet the prosecutor introduced a tape recording of the person's statements describing it as "her testimony" – to convict the defendant. App. 3, 6; *see also* Pet'n for Cert. at 4-5 (full excerpt from trial transcript). Everything else that the Washington Supreme Court speculated about in its opinion and that the State discusses in its opposition simply obscures the plain reality that conducting a "victimless" prosecution of this sort is incompatible with a constitutional right to be confronted with one's accuser. *See, e.g., Bruton v. United States*, 391 U.S. 123, 138 (1968) (Stewart, J., concurring) ("[A]n out-of-court accusation is universally conceded to be constitutionally inadmissible against the accused.").

Finally, even on its own terms, the State's request to delay taking a post-*Crawford* case until a future Term makes little sense. If, for some reason, this Court believes additional factual development is necessary to resolving confrontation issues like the one here, the best course of action would be to grant review here and to issue an opinion as soon as possible defining "testimonial" and instructing lower courts as to exactly what facts are relevant to the testimonial inquiry. That way, litigants and courts could start working by mid-summer in evidentiary hearings to avoid errors, instead of groping for several more months or years in the relative darkness, at the risk of having to re-try an ever-mounting number of cases.

C. The Washington Supreme Court's Decision Is Emblematic Of Many Courts' Refusals To Come To Grips With *Crawford*.

Given the stark incongruity between this victimless prosecution and a right to confront one's accusers, it is worth emphasizing that the State does not even try to defend the Washington Supreme Court's decision. The petition for certiorari pointed out, among

other things, that this Court included a footnote in *Crawford* suggesting the proper approach to dealing with accusatory "excited utterances" to governmental officials. *See* Pet'n for Cert. at 27 (discussing *Crawford*, 541 U.S. at 58 n.8). Yet the State, like every state and federal court that has held that such statements are not testimonial (*see* Pet'n for Cert. at 27), simply looks the other way.

Although it may not be paramount to the State whether this and "hundreds" of other convictions it has obtained and is seeking (Supp. App. at 1) comply with the Constitution, it should matter deeply to this Court. A recent case from California, *People v. Packard*, 2005 WL 1745329 (Cal. App. July 26, 2005) (not officially published), illustrates the kinds of prosecutions that will proceed unabated until this Court acts. There, a person working at a mini-mart called 911, told the dispatcher that he had been robbed, and described the alleged robber and robbery. The caller, with no apparent justification, "refused to testify at trial." *Id.* at *2. No matter; the State proceeded with the prosecution and simply played the 911 tape for the jury. The California Court of Appeal affirmed the conviction, holding that the caller's statements were not testimonial because he "told the dispatcher he was nervous" and the 911 call "was not a police interrogation." *Id.* at *4.

This Court should not wait any longer to address the propriety of such victimless prosecutions. The common law right to confrontation and the decision in *Crawford* strongly suggest that any statement knowingly telling a governmental agent that someone committed a crime is testimonial. *See* Pet'n for Cert. at 18-29. This Court should rectify the slippage that occurred during the era of *Ohio v. Roberts*, 448 U.S. 56 (1980), and confirm that this rule prevails today.

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CONCLUSION

For the foregoing reasons, as well as those stated in the Petition for Writ of Certiorari, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 11th day of October, 2005.

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SEA 1710433v1 50062-81188

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 73893-9
	)	
vs.	)	
	)	RESPONSE TO REQUEST FOR
ADRIAN M. DAVIS,	)	ORAL ARGUMENT
	)	
Appellant.	)	
	)	
	)	
	)	

Respondent has no objection to Davis' request for oral argument in this matter. The decision in this case may impact hundreds of rulings in the district courts and the superior courts. Thus, in the interests of providing trial courts and litigants with a timely answer to the questions posed by the supplemental briefs, the State respectfully requests that this case be set for argument in May or June, rather than September.

Submitted this 3rd day of May, 2004.

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Attorneys for Respondent

NO. [illegible]

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ADRIAN M. DAVIS,

Petitioner.

ANSWER TO BRIEF OF AMICUS WACDL

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3. 911 OPERATORS ASK QUESTIONS TO FACILITATE A RESPONSE; SUCH QUESTIONING DOES NOT TRANSFORM A 911 CALL INTO A POLICE INVESTIGATORY INTERVIEW.

WACDL argues that the 911 operator in this case asked "numerous questions that have nothing to do with attempting to resolve an existing public safety problem." Br. of WACDL at 11 (quotation marks and punctuation omitted). This is simply incorrect. The operator in this case asked direct, straightforward questions regarding information that a responding police officer would need to know. Those questions did not change the government's role in any significant respect. Nor did questions of this nature change the declarant's mental state.[5]

The questions occurred in roughly the following sequence: 1) What's going on? 2) Are you in a house or apartment? 3) Are there any weapons? 4) Has he been drinking? 5) What is his name and date of birth? 6) How and in what direction is he fleeing? 7) Do you need an aid car? 8) Is this your ex-husband or boyfriend? 9) Did he force his way into

---

[5] WACDL attached selected pages of the manual to its amicus brief. Although this information is available to the public upon request, it is outside the appellate record, and it is doubtful that ER 201 permits an appellate court to take "judicial notice" of any public document. RAP 9.1, 9.11; Tegland, 5 Washington Practice: Evidence §§ 201.1, 201.17 (4th ed.). Nevertheless, if this Court is inclined to consider WACDL's appendices, Respondent respectfully asks that it also consider the related materials attached to this brief. Appendix B. Moreover, Respondent respectfully asks that this Court's decision focus on questions asked in the *existing* record, and inferences that can be drawn from the questions asked. A different case may present different facts, but this Court should eschew dicta based on hypotheticals.

No. 05-5224

IN THE
SUPREME COURT OF THE UNITED STATES

ADRIAN MARTELL DAVIS,

Petitioner

v.

STATE OF WASHINGTON,

Respondent.

On Petition for Writ of Certiorari to the
Washington Supreme Court

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Very truly yours,

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IN THE
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v.

STATE OF WASHINGTON,

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SUPPLEMENTAL BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI

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Pursuant to Supreme Court Rule 15.8, Petitioner Adrian Martell Davis respectfully submits the following authority decided since the filing of his reply brief in support of certiorari: *United States v. Brito*, ___ F.3d ___, 2005 WL 2673671 (1st Cir. Oct. 20, 2005); *State v. Mann*, 2005 WL 2714531 (N.H. Super. Oct. 21, 2005).

These two new decisions, both of which hold that "excited utterances" describing recent criminal activity to 911 operators are not testimonial, acknowledge and deepen the split of authority concerning the question presented in this case. These decisions also further confirm that no evidence beyond that already contained in this case's record is necessary to decide whether these kinds of out-of-court accusations are testimonial. The First Circuit resolved the issue on the basis of a pre-*Crawford* trial record, and the New Hampshire Superior Court resolved the issue on the basis of a post-*Crawford* hearing that focused on exactly the same factual considerations as the Washington Supreme Court: "the [declarant's] demeanor, 'the temporal proximity to the incident, and the nature of the dialogue between [the declarant] and the operator.'" *Mann*, 2005 WL 2714531, at *4 (quoting *State v. Wright*, 701 N.W.2d 802, 811 (Minn. 2005)).

RESPECTFULLY SUBMITTED this 25th day of October, 2005.

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Thank you for your assistance in this matter.

Very truly yours,

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v.

STATE OF WASHINGTON,
Respondent.

On Petition for a Writ of Certiorari to the Washington Supreme Court

BRIEF OF *AMICI CURIAE* THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amicus curiae Public Defender Service for the District of Columbia represents indigent criminal defendants. *Amicus curiae* National Association of Criminal Defense Lawyers is a non-profit corporation with a membership of more than 10,000 attorneys nationwide, along with 78 state and local affiliate organizations numbering 28,000 members in 50 states.[1] As criminal defense lawyers, *amici* advise clients of their confrontation rights at trial, conduct cross-examinations of prosecution witnesses, and bring appellate challenges to restrictions on their clients' ability to confront prosecution witnesses—tasks they cannot perform effectively without a clear understanding of when the Sixth Amendment requires the government to present the testimony of witnesses against the accused in court and subject to cross-examination.

In *amici's* view, this Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), formulated a standard that, if properly applied, has the potential to substantially clarify this calculus. But as Petitioner has demonstrated, significant interim uncertainty remains about what constitutes a "testimonial" witness statement necessitating confrontation under *Crawford*—particularly where, in order to prove its case, the prosecution relies on "excited" criminal accusations made by an absentee witness in response to questioning by a 911 operator or a responding police officer.

Amici believe that the Court has two excellent vehicles to address the use of unconfronted criminal accusations that are the product of both these scenarios—Mr. Davis's case (accusatory statements to a 911 operator) and *Hammon v. Indiana*, 829 N.E.2d 444 (Ind. 2005), Docket No. 05-5705 (petition filed August 5, 2005) (accusatory statements to responding police officers). *Amici* encourage this Court to

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[1] Accompanying this brief are letters of consent to its filing. No counsel for any party authored any part of this brief, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

grant certiorari in both cases, as it has done in other related cases addressing a complex issue with widespread impact,[2] in order to put an end to the substantial uncertainty that currently plagues this important area of the law. To delay comprehensive guidance will perpetuate confusion in literally hundreds of criminal cases throughout the nation.

STATEMENT OF THE CASE

Amici adopt Petitioner's statement of the case, *see* Petition for Writ of Certiorari ("Pet.") at 1-6, with the additional observation that Mr. Davis's case shares three important similarities with those cases *amici* litigate daily in courts throughout the country.

1. Mr. Davis' case is representative of a group of post-*Crawford* cases that treat as unremarkable the absence at trial of the percipient witness to the alleged crime. Here, for example, the Washington Supreme Court determined that statements by an absentee accuser to a 911 operator were not "testimonial" despite the fact that it contained the "only evidence" linking Mr. Davis to the crime, Petitioner's Appendix ("Pet. App.") at 3, and despite the fact that the prosecutor could not even describe Ms. McCottry's statements to a lay jury without using the word "testimony." *Id.* at 6.

2. The-Washington Supreme Court's focus on whether the absentee witness was subjectively motivated solely by a desire to "bear witness" at the time she made her statements is also typical of a subset of courts interpreting *Crawford*. Pet.

---

[2] *See, e.g., Van Orden v. Perry*, 125 S. Ct. 346 (2004), and *McCreary County, Ky. v. ACLU*, 125 S. Ct. 310 (2004) (whether ten commandments displays violate the Establishment Clause); *Ewing v. California*, 535 U.S. 969 (2002), and *Lockyer v. Andrade*, 535 U.S. 969 (2002) (whether applications of California's Three Strikes Law violated the Cruel and Unusual Punishment Clause); *Sutton v. United Air Lines*, 527 U.S. 471 (1999), and *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999) (whether "correctable" disabilities are covered by Americans with Disabilities Act); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (whether employers are vicariously liable for sexual harassment under Title VII).

App. 5-6. In determining that Ms. McCottry was not so motivated, the Washington Supreme Court surmised that her statements were merely "a call for help," and the court appeared to look to Petitioner for contrary "evidence" concerning the absentee witness's subjective motivation for speaking. *Id.* The court also suggested that the "excited" accusations of an absentee witness to investigating police officers cannot serve as "testimonial" statements within the meaning of *Crawford* because they are never motivated solely by a desire to provide incriminating evidence. Pet. App. 5-6 (quoting *People v. Corella*, 18 Cal. Rptr. 3d 770 (2004)). The Washington court ignored this Court's observation in *Crawford* that an after-the-fact narrative of an event to government officials in response to questioning is testimonial, 541 U.S. at 58 n.8 (discussing *White v. Illinois*, 502 U.S. 346 (1992)), and that the admission of such a statement in *White* as a spontaneous declaration was "arguably in tension" with the Court's historical interpretation of the Confrontation Clause because such out-of-court statements would not have been admitted in criminal trials at common law. *Id.*

3. Instead of attempting to reconcile its analysis with either the common-law right to confrontation or the Framers' clear preference for in-court adversary testing described by this Court in *Crawford*, the Washington Supreme Court, like many courts nationwide, stressed that Ms. McCottry's statements to the 911 operator were not, in its view, the "functional equivalent" of the civil-law abuses that motivated the Framers to include the Clause in the Bill of Rights. Pet. App. 5-6. But, as is also typical of courts interpreting *Crawford* in this way, the Washington Supreme Court did not explain why, in resolving whether a statement necessitates confrontation under the *Crawford* analysis, tangential aspects of the historic abuses (such as the formality of *ex parte* affidavits) should play a decisive role in the "testimonial" analysis, while other seemingly more significant aspects of those abuses (namely, the fact that *ex parte* affidavits generally

involved criminal accusations made to known government agents by absentee witnesses) should be disregarded.

SUMMARY OF ARGUMENT

This Court should grant Mr. Davis's Petition, as well as the pending petition in *Hammon v. Indiana*, Docket No. 05-5705, in order to secure the uniform, analytically cohesive enforcement of the Sixth Amendment's confrontation guarantee. As demonstrated by Petitioner, the striking division among appellate courts regarding the "testimonial" nature of "excited utterances" made to 911 operators and responding police officers has matured and solidified. The lower courts cannot resolve this division because their dispute is not simply a matter of choosing among "formulations." *See Crawford*, 541 U.S. at 51-52. It stems from a basic disagreement about the purpose and scope of the Confrontation Clause now that the Court has reconnected it with its common-law origins.

On one side of this dispute are the courts that read *Crawford* as requiring a construction of the Sixth Amendment confrontation guarantee at least as broad as the common-law confrontation right. These courts are guided by this Court's repeated references to the functional common-law right and the Framers' belief that adversarial testing was an indispensable protection for a person accused of a crime. On the other side of this split are courts, like the Washington Supreme Court, that treat the confrontation guarantee as one that can be routinely denied based on the presence or absence of a variety of inconsistently applied arbitrary and subjective factors—much as was done under *Ohio v. Roberts*, 448 U.S. 56 (1980). To the extent these courts refer to the common-law origins of the right to confrontation at all, they limit their focus to tangential aspects of the *ex parte* affidavit practice that prompted the Framers to include the Confrontation Clause in the Bill of Rights, without explaining why the Framers would have accepted a definition of "testimonial" statements that leaves the government free to evade the common-law right to confrontation in new and different ways.

Mr. Davis's and Mr. Hammon's cases provide excellent vehicles for resolving this dispute. Both were witnessless criminal prosecutions that would have been forbidden at common law because they rose or fell on unconfronted criminal accusations made by an absentee witness to known government agents. Accordingly, in *amici*'s view (and the view of many appellate courts), such a prosecution should have been forbidden under *Crawford*. Because the Washington Supreme Court and the Indiana Supreme Court (among others) have held otherwise—applying an analysis representative of those courts that construe the confrontation right as far more narrow and pliable than it was at common law—granting review in Mr. Davis's case and Mr. Hammon's case will give this Court the means to resolve this fundamental dispute about the nature and purpose of the Sixth Amendment confrontation guarantee.[3]

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD CLARIFY THE GOAL OF *CRAWFORD'S* "TESTIMONIAL" INQUIRY.

The confusion about how to identify a "testimonial" statement, documented by Petitioner, *see* Pet. 8-18, is the product of a fundamental dispute about the purpose and scope of the Sixth Amendment right to confrontation now that the Court has reconnected it to its common-law origins.

A. The Common Law As Baseline.

Some courts read *Crawford* as reinforcing a "categorical constitutional guarantee[]," 541 U.S. at 68, founded on the common-law requirement that people functioning as witnesses against the accused provide "live testimony in court subject to adversarial testing," *id.* at 43, and born of the desire of the Framers to confer on defendants adequate means at a

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[3] *Amici* fear that granting certiorari in *either* a 911 case *or* a responding officer case will be insufficient because courts will continue to narrowly limit their definition of "testimonial" statements only to those expressly declared "testimonial" by this Court.

criminal trial to probe the government's evidence against them—especially where that evidence consists of accusatory statements to known government agents.[4] This understanding of the Sixth Amendment right, where confrontation of percipient witnesses is the norm, is grounded in the detailed discourse in *Crawford* of the common-law origins of the Confrontation Clause and the value accorded to the practice of adversarial testing.

Throughout its opinion in *Crawford*, the Court repeatedly reaffirmed the common-law roots of the confrontation guarantee, noting that the Clause is "most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the found-

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[4] *See, e.g., United States v. Summers*, 2005 WL 1694031 (10th Cir. (N.M.) Jul. 21, 2005) (statement by defendant's companion made to police testimonial); *United States v. Arnold*, 410 F.3d 895 (6th Cir. 2005) (accusations to police testimonial); *United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005) (accusations to "forensic interviewer" testimonial); *United States v. Solomon*, 399 F.3d 1231 (10th Cir. 2005) (statement by defendant's companion made to police testimonial); *United States v. Cromer*, 389 F.3d 662 (6th Cir. 2004) (accusations to police testimonial); *People v. Adams*, 16 Cal Rptr. 3d 237, 244 (Cal. App.) (accusations to responding police officers testimonial), *review granted*, (Cal. 2004); *Lopez v. State*, 888 So. 2d 693 (Fla. App. 2004) (same); *Miller v. State*, 2005 WL 1423393 (Ga. App. June 20, 2005) (same); *State v. Grace*, 111 P.3d 28 (Haw. App. 2005) (same); *In re E.H.*, 823 N.E.2d 1029, 1036 (Ill. App. 2005) (absentee complainant "bore accusatory testimony" because out-of-court accusations were repeated in court); *State v. Snowden*, 867 A.2d 314 (Md. 2005) (accusations to sexual abuse investigator testimonial); *State v. Clark*, 598 S.E.2d 213 (N.C. App.) (statements to police testimonial), *review denied*, 601 S.E.2d 866 (N.C. 2004); *State v. Lewis*, 603 S.E.2d 559 (N.C. App.) (same), *review allowed and appeal dismissed*, 608 S.E.2d 60 (N.C. 2004); *People v. Cortes*, 781 N.Y.S.2d 401 (N.Y. Sup. Ct. 2004) (911 call testimonial); *State v. Hill*, 827 N.E.2d 351 (Ohio App. 2005) (accusation to responding police officer testimonial); *Mason v. State*, 2005 WL 1531286 (Tex. App. June 30, 2005) (same); *cf. State v. Branch*, 865 A.2d 673, 692 (N.J. 2005) (in order to "pay proper respect to the principles animating our Confrontation Clause jurisprudence," excited utterances to police inadmissible).

ing." 541 U.S. at 54; *see also id.* at 54 n.5 ("the Sixth Amendment incorporated the *common-law* right of confrontation"); *id.* at 68 ("the Sixth Amendment demands what the common law required"). In 1791, these exceptions were limited. *See id.* at 54 n.5 ("Marian examinations were admissible . . . only because the statutes *derogated* from the common law" but that by 1791 "even the statutory-derogation view had been rejected"); *id.* at 56 n.6 & 58 n.8 (delineating established exceptions to common-law confrontation right as of 1791; spontaneous declarations not part of the *res gestae* were not then established).

Although the Court in *Crawford* noted that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure," 541 U.S. at 50, it gave no indication that the constitutional right to confrontation was meant solely to prevent the replication of these historic abuses of the common-law right, while leaving functionally equivalent encroachments unregulated. Rather, the Court endorsed as a whole the common-law understanding that defendants should be permitted to confront their accusers—the "witnesses against" them—before the trier of fact in order to elicit additional information, probe inconsistencies or untruths, and thereby demonstrate reason to doubt the government's charges. *Id.* at 43-56, 61-62, 66-68. The Court also indicated that, where there was no "direct evidence" of the Framers' reaction to modern-day limitations on confrontation, courts should employ a "reasonable inference" analysis to preserve confrontation rights. *Id.* at 52 n.3.

The reliance on the common-law confrontation right as the baseline organizing principle for identifying "testimonial" statements comports with the Court's discussion of adversarial testing as *the* fundamental procedural guarantor of reliability:

> [The Confrontation Clause] commands . . . that reliability be assessed . . . by testing in the crucible of cross-examination . . . . [and] thus reflects a judgment, not

> only about the desirability of reliable evidence . . . , but about how reliability can best be determined. *Cf.* 3 Blackstone, Commentaries, at 373 ("This open examination of witnesses . . . is much more conducive to the clearing up of truth"); M. Hale, History and Analysis of the Common Law of England 258 (1713) (adversarial testing "beats and bolts out the Truth much better").

541 U.S. at 61-62; *see also id.* at 62 (condemning *Roberts* because "it allows a jury to hear evidence untested by the adversary process, based on a mere judicial determination of reliability").

Despite these many indications in *Crawford* that the object of the testimonial inquiry is to promote the practice of bringing live witnesses into court and to ensure today at least as broad an opportunity for cross-examination as existed in 1791, some appellate courts have taken a quite different approach. These courts accord little or no import to whether a person is, within a common-law or common-sense understanding, functioning as a "witness against" the defendant at trial, and they minimize, if not entirely disregard, the utility of adversarial testing. Much as they did under *Ohio v. Roberts*, these courts continue to act as gatekeepers and make subjective determinations about the need for confrontation based on ahistorical, arbitrary, and manipulable tests that reduce the confrontation right to a technicality. In order to find support for their varying pliable tests, these courts read isolated passages of *Crawford* out of context and ignore this Court's reliance on the common law and "the principles [it] sought to vindicate." *United States v. Booker*, 125 S. Ct. 738, 753 (2005).

B. *Roberts* Redux: Conditioning the Right to Confrontation On Speculation About the Absentee Witness's Subjective Motivation.

Instead of asking whether confrontation would have been required at common law as it existed in 1791, the Washington

Supreme Court, like many others,[5] held that assessing whether a statement made in a 911 call is testimonial involves "scrutiniz[ing] [the call] . . . to determine whether it is a call for help to be rescued or whether it is generated by a desire to bear witness." Pet. App. at 5. The court noted that Ms. McCottry had made her accusations to the 911 operator "as part of an ongoing emergency situation" while she was "crying and hysterical," *id.* at 6, and found that she was subjectively motivated to "call[] 911 because she was in immediate danger." *Id.* at 7. Based on its supposition that the absent Ms. McCottry's single subjective motive to speak to the 911 operator was to "call for help," the court held that her accusatory statements were nontestimonial and were admissible without confrontation. *Id.* at 6-7.

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[5] *See, e.g., United States v. Brun*, 2005 WL 1797451 at *3 (8th Cir. (Minn.) Aug. 1, 2005) ("emotional and spontaneous" 911 call nontestimonial); *Massey v. Lamarque*, 2005 WL 1140025 (9th Cir. May 9, 2005) ("spontaneous" accusation by "upset" witness on 911 tape nontestimonial); *Anderson v. State*, 111 P.3d 350, 354 (Alaska App. 2005) (accusatory "excited response" to responding police officer nontestimonial); *People v. Aubrey*, 2004 WL 2378400, at *7 (Cal. App.) (911 call nontestimonial because it was "a cry for help"), *review denied*, (Cal. Jan 12, 2005); *People v. Caudillo*, 19 Cal. Rptr. 3d 574, 590 (2004) (911 call nontestimonial where caller-witness reported crime to "protect the community"); *Hammon*, 829 N.E.2d at 458 (accusatory excited utterances to responding police officer nontestimonial where witness's motivation was simply "to convey basic facts"); *State v. Barnes*, 854 A.2d 208 (Me. 2004) (accusations made by "stressed" complainant who drove to police station on her own initiative nontestimonial); *People v. Walker*, 697 N.W.2d 159 (Mich. App. 2005) ("excited" accusations to neighbor and police nontestimonial); *State v. Wright*, 686 N.W.2d 295 (Minn. App.) (accusations in 911 call nontestimonial because complainant was seeking aid), *review granted*, (Minn. 2004); *People v. Coleman*, 791 N.Y.S.2d 112 (N.Y. App. Div. 2005) (same); *People v. Moscat*, 777 N.Y.S.2d 875 (N.Y. Crim. Ct. 2004) (same); *State v. Cannaday*, 2005 WL 736583 (Ohio App. Mar. 31, 2005) (accusations by "upset" complainant to police nontestimonial); *Commonwealth v. Gray*, 867 A.2d 560 (Pa. App. 2005) (excited utterances to responding police officers nontestimonial); *State v. Anderson*, 2005 WL 171441 (Tenn. App. Jan 27, 2005) (same); *Key v. State*, 2005 WL 467167 (Tex. App. Feb. 28, 2005) (same).

In *amici's* view, this focus on the subjective motivations of the speaker as the pivotal factor in the "testimonial" analysis cannot be reconciled with *Crawford*'s insistence on the common law as the touchstone for determining which statements require an opportunity for confrontation. Nothing in the common-law history suggests that the subjective motivations of the speaker should play any role in the analysis of which statements are "testimonial" and therefore necessitate confrontation. Thus, as the Court explained in *Crawford*, 541 U.S. at 62, the Framers' objection to Sir Walter Raleigh's trial, a quintessential common-law confrontation abuse, had nothing to do with Lord Cobham's subjective motivations for writing his accusatory letter or testifying before the Privy Council. Indeed, the whole point of confrontation would have been to allow Raleigh to explore Cobham's subjective motivations in making the accusations, by "confront[ing] Cobham in court, where he could cross-examine him and try to expose his accusation as a lie." *Id.*

A focus on the subjective motivations of the absentee witness not only has no foundation in the common law, but also runs afoul of this Court's efforts in *Crawford* to disentangle the confrontation guarantee from hearsay rules. Like a subjective test for "testimonial" statements, what constitutes admissible hearsay as an excited utterance or a spontaneous declaration also turns on the subjective motivation of the speaker. These statements are deemed to be motivated by the exciting event—not by any conscious design, much less the desire to bear witness. *See, e.g.*, Pet. App. at 15. In fact, the Washington Supreme Court favorably cited a California appellate court decision that observed that "it is difficult to perceive circumstances under which a statement qualifying as an excited utterance would be testimonial."[6] Pet. App. at 5; *but*

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[6] Numerous courts have held that statements admissible under *Roberts* as "excited utterances" or "spontaneous declarations" by their very nature cannot be "testimonial" under *Crawford*. *See* Pet. at 10-11.

see Crawford, 541 U.S. at 58 n.8 (spontaneous declaration in *White* was "testimonial"). By focusing on precisely the same factors that a court would look to in determining whether to apply the "excited utterance" exception to the hearsay rule, the Washington Supreme Court's analysis improperly "leav[es] the Sixth Amendment's protection to the vagaries of the rules of evidence," *Crawford*, 541 U.S. at 61, and its analysis of the confrontation question is virtually indistinguishable from what it would have been under *Roberts*.

Moreover, a test that turns on speculative assumptions about an absent witness's subjective motivations is inconsistent both with this Court's admonition in *Crawford* that "only cross-examination could reveal" a witness's "perception of her situation," 541 U.S at 66, and with this Court's suggestion that testimonial statements may be identified by examining whether the circumstances surrounding the statement "would lead an *objective* witness *reasonably* to believe that the statement would be available for use at a later trial." *Id.* at 52 (emphasis added). An objective analysis under *Crawford* of what a witness anticipates (as opposed to what her motives are), would, as it did under the common law, focus on whether the statement is an accusation of a completed crime, whether it was made to a known government agent, and whether, given these factors, a reasonable person would know the statement is one that might be used in a criminal proceeding. In addition to their historical accuracy, reliance on these objective factors makes it easy to determine when confrontation will be required.

By contrast, reliance on the subjective motivation test espoused by the Washington Supreme Court and others makes it nearly impossible to predict whether a court will require confrontation for a particular statement. In Mr. Davis's case, the Washington Supreme Court focused on the emergency situation and Ms. McCottry's emotional upset as a basis for its supposition that her subjective motivation was to "call for help." But, as the dissent noted, there was contrary record evidence that

Ms. McCottry "never ask[ed] for help," Pet. App. 10, and, when asked if she needed an "aid car," told the 911 operator, "no I'm alright." *Id.* at 25. This, in conjunction with the accusatory nature of her statements and the fact that they were made to a government agent, could have supported a conclusion—under the same subjective test—that her subjective motivation was to bear witness because she must have known that her statements would be available for use in a later criminal proceeding. Moreover, it is entirely possible and reasonable to conclude on this record, as in many of these cases, that Ms. McCottry had *multiple* motivations for speaking to the 911 operator,[7] rendering the subjective motivation test all the more unpredictable and difficult to employ.

Finally, of particular concern to *amici*, adopting a subjective motivation test for "testimonial" statements where the right to confrontation under a given set of facts will "vary from place to place and from time to time"[8] presents a host of problems for practitioners. In addition to encountering grave difficulties in advising a client pre-trial about her Sixth Amendment rights, defense counsel would face obstacles in seeking to assert the client's confrontation rights at trial. In the regular course, defense counsel will not have had access to the absent percipient witnesses, thus making it difficult for counsel to challenge the prosecution's assertions about the percipient witnesses' subjective motivations. More troubling is the Washington Supreme Court's apparent suggestion that

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[7] Even if one of those motives were to seek aid, that should not obviate confrontation, because the desire to seek help does not preclude a witness from telling untruths. *See, e.g., United States v. Wilmore*, 381 F.3d 868 (9th Cir. 2004) (911 caller made false accusations in order to get the police to respond quickly to her home).

[8] *See Devenpeck v. Alford*, 125 S. Ct. 588, 594 (2004) (condemning standard of probable cause that turned on officer's subjective reason for making arrest, explaining that it is intolerable for the constitutional validity of the exact same arrest to turn on the officer's stated reasons for making the arrest).

a defendant has some unspecified burden to affirmatively present "evidence" about the witness's subjective motivations in speaking with police or he risks losing the right to confront the witness. Pet. App. at 6 (denial of confrontation affirmed in part because "no evidence that McCottry" subjectively possessed or was influenced by "common knowledge" that taped 911 calls could be used as evidence). Nothing in the common-law history of the Confrontation Clause or this Court's *Crawford* decision even hints that a defendant's confrontation rights turn on his ability to affirmatively prove the absent witness's subjective desire to bear witness. In addition to all the other problems with a subjective motivation test, the contrary suggestion by the Washington Supreme Court and other courts illustrates the urgent need for this Court to intervene and provide lower courts with further guidance on this issue.

C. *Roberts* Redux: Limiting Confrontation to Only Those Statements That Mirror Tangential Aspects of the Common-Law Abuses.

The Washington Supreme Court, like many others around the country, concluded without meaningful analysis that the Sixth Amendment right to confrontation also turns on whether an out-of-court witness statement sufficiently duplicates the formality or some other tangential aspect of the *ex parte* examination practice that was of immediate concern to the Framers.[9] Thus, the Court also affirmed the denial of con-

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[9] *See, e.g., Anderson*, 111 P.3d at 357-58 (concurrence) (testimonial statements are the product of "the kind of formal, systematic questioning that was characteristic of the English inquisitorial practices that prompted the enactment of the Confrontation Clause"); *Aubrey*, 2004 WL 2378400, at *6 (accusations made to investigating police officer and 911 operator nontestimonial where court "could not believe that the framers would have seen a striking resemblance" between them and a justice of the peace's pre-trial examination"); *People v. Cage*, 15 Cal. Rptr. 3d 846, 854 (Cal. App. 2004) (accusations made to doctor nontestimonial because he "was not performing any function remotely resembling that of a Tudor, Stuart

frontation in Mr. Davis's case because "[Ms.] McCottry's 911 call cannot accurately be described as an ex parte examination or its functional equivalent." Pet. App. at 6.

Telephones, 911 operators, and professional police forces did not exist in 1791. Thus it is hardly surprising that the Framers had no express views on the use of 911 calls at criminal trials. But this omission merely proves why limiting "testimonial" statements to those that mirror the specific abusive mechanisms of Tudor, Stuart, or Hanoverian England is a woefully insufficient means of safeguarding the constitutional confrontation guarantee. Any meaningful analysis must focus on the "functional" problem of gravest concern to the Framers—the existence of patently unfair trials like Sir Walter Raleigh's, in which people were deprived of liberty and life based on criminal accusations to government agents that were never subjected to adversarial testing. In that dispositive respect, Ms. McCottry's unconfronted accusations to a 911 operator *can* "accurately be described" as the "functional equivalent" of the abusive practices most familiar to the Framers, who were not so shortsighted as to fail to predict that, if one particular means of evading the common-law right to confrontation were closed off, the government would inevitably find others.

It turns history on its head to ignore the salient aspects of Ms. McCottry's statements for confrontation purposes—that they were accusatory and made to a known government official—and to limit testimonial statements to those that sufficiently duplicate the civil-law abuses of which the Framers disapproved. After all, the "abuses" described in *Crawford* were only abuses at all because they sought to encroach, through a veneer of formality, on the established, broad common-law right that entitled an accused to confront his

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or Hanoverian justice of the peace"); *State v. Hembertt*, 696 N.W.2d 473, 481 (Neb. 2005) ("Police interrogations bear a striking resemblance to examinations by justices of the peace in England" but police interview of complainant eliciting accusations was not an interrogation).

accuser in open court. The sixteenth and seventeenth century mechanisms used to evade the common-law right cannot now be used to define the whole of that right as it is preserved in the Confrontation Clause. Moreover, there is every reason to believe that at common law the informality of 911 calls would have *heightened,* not lessened, concerns about the use of such statements in criminal prosecutions. Indeed, *State v. Campbell*, 30 S.C.L. 124, 1844 WL 2558 at * 3 (App. L. 1844)—a nineteenth century decision relied on by this Court in *Craw-ford*, 541 U.S. at 49—made clear that the "emergency" and "excited" nature of common-law coroner's inquests made them even *less* amenable "to dispens[ing] with any of the common law guards."

The abuses-only construct of the right to confrontation not only misconstrues the parameters of the common-law right, but also, as with the subjective motivation test for "testimonial" statements, permits courts to make entirely subjective and unpredictable determinations as to when confrontation is warranted. In their efforts to determine when a modern-day police practice sufficiently resembles the civil-law abuses, some appellate courts have articulated a mish-mash of possible characteristics of a testimonial statement (its formality,[10] its timing in relation to the alleged incident, [11] its timing in relation to the filing of criminal charges,[12] the pres-

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[10] *See, e.g., State v. Maclin*, 2005 WL 313977 (Tenn. App. Feb. 9, 2005) (nontestimonial: "informal" accusation to police responding to 911 call); *Lee v. State*, 143 S.W.3d 565, 570 (Tex. App. 2004) (testimonial: recording statement made after roadside traffic stop rendered it sufficiently formal); *but see People v. Kilday*, 20 Cal. Rptr. 3d 161, 173 (Cal. App. 2004) ("presence or absence of indicia of formality" not "determinative"), *review granted*, 23 Cal Rptr. 3d 693 (Cal. 2005).

[11] *See, e.g., Wright*, 686 N.W.2d at 302 (nontestimonial: statement made to police minutes after alleged incident); *but see People v. King*, 2005 WL 170727 (Colo. App. Jan. 27, 2005) (nontestimonial: time between injury and elicitation of statements by police unknown).

[12] *See, e.g., Aubrey*, 2004 WL 2378400, *8 (nontestimonial: "no suspect was under arrest, no trial was contemplated"); *Lee*, 143 S.W.3d at

ence or absence of structured police questioning,[13] the location in which it was made,[14] the identity of the witness,[15] the identity of the auditor,[16] the state of mind of the auditor,[17] the state of mind of the witness[18]). But these factors (none of which captures the most important features of the civil-law

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570 (testimonial: statement made after defendant's arrest); *but see Stancil v. United States*, 866 A.2d 799 (testimonial: made to police after scene was secured but before arrest), *reh'g en banc granted*, 2005 WL 1653880 (D.C. June 29, 2005).

[13] *See e.g.*, *Aubrey*, 2004 WL 2378400, at *8 (nontestimonial: no "structured [police] questioning, just an open-ended invitation for . . . [the witnesses] to tell their story"); *Barnes*, 854 A.2d 208 (nontestimonial: voluntary accusation); *Davis v. State*, 2005 WL 183141, *4 (Tex. App. Jan. 27, 2005) (same); *but see Talley v. Commonwealth*, 2005 WL 387443, at *3 (Ky. Feb. 17, 2005) (nontestimonial: government officers involvement in statement's production irrelevant).

[14] *See, e.g., King*, 2005 WL 170727, at *5 (nontestimonial: statement made to police officer in noncustodial setting and without indicia of formality); *but see Barnes*, 854 A.2d at 211 (*non*testimonial: statement made at police station).

[15] *See, e.g., Davis*, 2005 WL 183141, at *4 (nontestimonial: police did not consider who made accusatory statement to be "a suspect, an accomplice, or a co-conspirator"); *but see Wright*, 686 N.W.2d at 302 (nontestimonial: 911 caller expects to maintain "cloak of anonymity").

[16] *See, e.g., People v. R.F.*, 825 N.E.2d 287, 295 (Ill. App. 2005) (*Crawford* "applies only to statements to government officials"); *Heard v. Kentucky*, 2004 WL 1367163, at *5 (Ky. App.) (accusatory statement to grandmother and doctor nontestimonial, but accusatory statement to police testimonial), *review granted*, (Ky. 2005); *but see Barnes*, 854 A.2d at 211 (*non*testimonial: statement made to police at police station).

[17] *See, e.g., People v. Bradley*, 2005 WL 1774080 at *7 (N.Y. App. Div. July 28, 2005) (what is testimonial turns on "the objective of the person posing the question"); *Corella*, 18 Cal. Rptr. 3d at 776 (nontestimonial: 911 call; 911 operator was "not conducting a police interrogation in contemplation of a future prosecution"); *Stancil*, 866 A.2d at 812-13 (nontestimonial: made to police officers who were "securing scene"); *Hembertt*, 696 N.W.2d at 483 (same); *but see Hammon*, 829 N.E.2d at 456 (what is testimonial turns on motive of questioner *and* responder).

[18] *See* Pet. at 10-11 (cases holding excited utterances are nontestimonial); *see also Brun*, 2005 WL 1797451 (same); *Key*, 2005 WL 467167 (same); *but see Stancil*, 866 A.2d at 809 (some excited utterances are testimonial); *Hembertt*, 696 N.W.2d at 482 (same); *Hammon*, 829 N.E.2d at 456 (motives of questioner *and* responder are dispositive).

abuses, *see* Point II *infra*) vary, and it is unclear which factors (or combination thereof) are dispositive. *See* 541 U.S. at 63 (unpredictability of multi-faceted *Roberts* test "fail[ed] to provide meaningful protection from even core confrontation violations"). This test is a return to the *Ohio v. Roberts* regime so pointedly rejected in *Crawford*.

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Like *Crawford* before it, Mr. Davis's case is a "self-contained demonstration" of the "unpredictable and inconsistent application" of the right to confrontation, 541 U.S. 66, which this Court should use to clarify which of the lower court analyses more accurately reflects its vision of the confrontation right. But *Davis* alone cannot capture the depth and breadth of the post-*Crawford* confusion, and there is every reason to believe that, even if this Court clarifies the application of *Crawford* to 911 calls, further clarification will nonetheless be required in the responding officer context. *See* nn. 9-18 *supra* (documenting the varied and conflicting factors upon which courts are relying to deny the right to confrontation). Accordingly, this Court should also consider granting review in *Hammon v. Indiana*, Docket No. 05-5705. This Court has frequently used the practice of granting review in two cases involving different permutations of the same issue in order to provide more comprehensive guidance to lower courts, *see* note 2 *supra*, and such a procedure would be especially appropriate here, where the legal confusion stemming from this Court's *Crawford* decision is widespread.

II. THIS COURT SHOULD CLARIFY THAT ACCUSATORY STATEMENTS ABOUT COMPLETED CRIMES TO KNOWN GOVERNMENT OFFICIALS ARE "TESTIMONIAL."

Like the trial of Sir Walter Raleigh, Mr. Davis's trial was a "paradigmatic confrontation violation," *Crawford*, 541 U.S. at 52, when viewed through the lens of the common law. Raleigh's complaint and his contemporaries' shame was that

he had been prevented from confronting his accuser, Lord Cobham, in court and that Cobham's unconfronted statements to the Privy Council were used to convict him. *Id.* at 44, 62. Like Raleigh, Mr. Davis was never permitted to confront Ms. McCottry, upon whose out-of-court accusations made to a known government agent—described by the prosecutor in closing as "testimony"—the government's entire case relied. But although the Washington court acknowledged that McCottry's identification of Davis as her assailant was "essential to the prosecution of this case," it deemed her statements "nontestimonial and properly admitted." Pet. App. 7. In so doing, it ignored their accusatory nature and deemed significant that they were the product of a 911 call, not "an in custody interrogation by police." *Id.* at 5.

The text and history of the Sixth Amendment preclude a definition of "testimonial" statements that authorizes the introduction at trial of facially accusatory out-of-court statements to known government agents without any opportunity for cross-examination. First, a person accusing someone of a past crime—an accuser—is the quintessential "witness against" the "accused" in a "criminal prosecution" contemplated by the Sixth Amendment. U.S. Const. amend. VI; *see also Crawford*, 541 U.S. at 43 (the Confrontation Clause has its roots in the "right to confront one's accusers . . . [in] Roman times"); *Bruton v. United States*, 391 U.S. 123, 138 (1968) (Stewart, J., concurring) ("[A]n out-of-court accusation is universally conceded to be constitutionally inadmissible against the accused"). Indeed, as in Mr. Davis's case, an accuser's statements typically serve as the foundation, if not the whole, of the prosecution's case. "[T]he legal community at the time of the framing understood that at least a witness who made an accusation against the defendant was the equivalent of a witness against him." Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sex Abuse Prosecutions*, 1993 U. Ill. L. Rev. 691, 750 (discussing *King v. Brasier*, 168 Eng. Rep. 202

(1779) (complainant impermissibly acted as a witness against the defendant by virtue of the introduction of her unsworn accusations at trial)).

Second, government involvement in procuring a witness statement about a completed crime—regardless of its precise form—also should render a statement "testimonial." As the Framers were well aware, government involvement in securing witness statements always carries the potential for abuse because it places the government in the position of ensuring that the government's side of the story is the one the witness tells. *Crawford*, 541 U.S. at 53, 56 n.7. "Neutral" government officers, 541 U.S. at 66, are trained to elicit the precise information the government needs to sustain a prosecution. *See, e.g.*, Pet. App. 21-23.[19] There is only added danger when the statements are elicited in haste, shortly after an alleged incident, by government agents making an initial assessment of the situation based on incomplete information because the government may unwittingly pursue charges that only adversarial questioning could expose as exaggerated or unfounded.

For these reasons, the involvement of known government officials in securing witness statements also triggered (but was not the sole prerequisite for) the common-law confrontation right. A well-documented abuse of that right arose from the introduction of sworn statements to justices of the peace (the closest analog to our modern-day police) in lieu of live witness testimony. 541 U.S. at 43. Similarly, much of the evidence introduced against Sir Walter Raleigh "in derogation of the common law" was elicited from Lord Cobham by the

---

[19] In the instant case, the 911 operator tracked the questions scripted in the "Police Incident Interview Techniques" set forth in the city's standard operating procedures—questions that were drafted knowing that arrests could be made based on information gathered from 911 callers. Pet. App. 9 n.5 & 21-28; Pet. at 2 (quoting Standard Operating Procedures, Section 4, at 29).

Privy Council. *Id.* at 44, 46.[20] Thus, just as "[t]he Framers would be astounded to learn that *ex parte* testimony could be admitted . . . because it was elicited by 'neutral' government officers," *id.* at 66, the Framers would be appalled at the widespread practice of convicting defendants based in large part on "dial-in" 911 testimony or officers' hearsay accounts of complainants' on-the-scene accusations. Richard Friedman & Bridget McCormack, *Dial-in Testimony*, 150 U. Pa. L. Rev. 1171 (2002).

There is no textual, historical, or common sense justification for a definition of "testimonial" that compels confrontation for statements derived from "in custody interrogation" and that shelters from adversarial testing accusations that have been made "informally" and in haste to government agents. 541 U.S. at 61 ("the Clause's ultimate goal is to ensure reliability of evidence" through cross-examination). That the Washington Supreme Court and many like it have determined that the latter statements are not "testimonial" under *Crawford* illustrates the critical need for this Court to provide further guidance on this issue.

CONCLUSION

For the reasons set forth above, the Petition should be granted.

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[20] The historical record does not reflect that the Framers were concerned exclusively, or even primarily, with ensuring confrontation only for those statements made in response to coercive or overly suggestive questioning by government officials. Indeed, many common-law abuses involved witnesses (apparently labeled "bringers") who made statements to the Justices of the Peace and who "were extremely willing witnesses"—thus rendering leading questions "unnecessary." Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. Rich. L. Rev. 511, 568 (2005).

Respectfully submitted,

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No. 05-5224

Supreme Court, U.S.
FILED
DEC 2 4 2005
OFFICE OF THE CLERK

In The Supreme Court of the United States

ADRIAN MARTELL DAVIS,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

On Writ Of Certiorari To The Washington Supreme Court

JOINT APPENDIX

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Date	Court	Description
4/20/01	King County, WA Superior Court	Information Filed Against Petitioner for Felony Violation of a No-Contact Order
8/28-8/30/01; 9/4-9/5/01	King County, WA Superior Court	Petitioner's Trial
9/6/01	King County, WA Superior Court	Petitioner Found Guilty of Felony Violation of a No-Contact Order
12/14/01	King County, WA Superior Court	Judgment Entered and Petitioner Sentenced to 15 Months in Prison
12/17/01	WA Court of Appeals, Division I	Notice of Appeal Filed by Petitioner
1/13/03	WA Court of Appeals, Division I	Oral Argument Heard
3/10/03	WA Court of Appeals, Division I	Opinion Issued, Petitioner's Conviction and Sentence Affirmed
4/10/03	WA Supreme Court	Petition for Review Filed by Petitioner
9/5/03	WA Supreme Court	Petition for Review Granted
11/19/04	WA Supreme Court	Oral Argument Heard

3/25/04	WA Supreme Court	Order Directing the Parties to Submit Supplemental Briefing in Light of *Crawford v. Washington*, 541 U.S. 36 (2004)
9/14/04	WA Supreme Court	Oral Argument Heard Regarding *Crawford* Issue
5/12/05	WA Supreme Court	Opinion Issued, Petitioner's Conviction and Sentence Affirmed
5/31/05	WA Supreme Court	Order Changing Opinion

STATE EXHIBIT 5

IN THE DISTRICT COURT NO. 1
OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff,

vs.

ADAIRAN MERTELL DAVIS, Defendant.

No. Y0C010565

ORDER PROHIBITING CONTACT

___While awaiting trial
✓ As a condition of sentence

Race Black Sex M DOB 08/13/65 Height 5'5" Weight 220 Eyes Brown Hair Brown

THIS MATTER having come before the undersigned Judge of the above entitled court, and the court having considered the records and files herein and being fully advised in the premises, Now, Therefore,

IT IS HEREBY ORDERED pursuant to RCW 10.99 and RCW 26.50, that the defendant shall have no contact, directly or indirectly, in person, in writing or by telephone, personally or through any other person with Michele McCottry DOB 5/10/69 until 7/5/02 or until modified or terminated by the court.

WARNINGS TO THE DEFENDANT: Violation of the provisions of this order with actual notice of its terms is a criminal offense under chapter 10.99 RCW, and chapter 26.50 RCW and will subject a violator to arrest. If the violation of the order prohibiting contact involves travel across a state line or the boundary of a tribal jurisdiction, or involves conduct within the special maritime and territorial jurisdiction of the United States, which includes tribal lands you may be

subject to criminal prosecution in federal court under 18 U.S.C. sections 2261, 2261.A, or 2262.

Any assault, drive-by shooting, or reckless endangerment that is a violation of this order is a felony. Any conduct in violation of this order that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony.

Effective immediately, and continuing as long as this order prohibiting contact is in effect, you may not possess a firearm or ammunition. 18 U.S.C. section 922(g)(8). A violation of this federal firearms Jlaw carries a maximum possible penalty of 10 years in prison and a $250,000 fine. An exception exists for law enforcement officers and military personnel when carrying department/government-issued firearms. 18 U.S.C. section 925(a)(1). If you are convicted of an offense of domestic violence, you will be forbidden for life from possessing a firearm or ammunition. 18 U.S.C. section 922(g)(9); RCW 9.41.040.

YOU CAN BE ARRESTED EVEN IF THE PERSON OR PERSONS WHO OBTAINED THE ORDER INVITE OR ALLOW YOU TO VIOLATE THE ORDER'S PROHIBITIONS. You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order upon written application.

Pursuant to 18 U.S.C. section 2265, a court in any of the 50 states, the District of Columbia, Puerto Rico, any United States territory, and any tribal land within the United States shall accord full faith and credit to the order.

NOTICE: To the Sheriff of Pierce County, Chief of the Tacoma Police Department and all peace officers:

YOU ARE HEREBY DIRECTED to maintain a record of this Order Prohibiting Contact and enforce its provisions.

PLEASE NOTIFY the Pierce County Prosecuting Attorney's Office, 930 Tacoma Avenue South, Room 109, Tacoma, Washington 98402 (253) 798-7446 if the defendant violates the terms of the Order.

DATED this 6 day of July, 2000.

/s/ Jack [Illegible]
Judge

Presented by:

/s/ [Illegible]
Deputy Prosecuting Attorney

Copy Received:

/s/ Adairan M. Davis
Defendant

_____
Date

SUPERIOR COURT OF WASHINGTON –
FOR KING COUNTY

THE STATE OF WASHINGTON, Plaintiff, v. ADRIAN MARTELL DAVIS Defendant.	WARRANT ISSUED CHARGE COUNTY $110.00 No. 01-1-02794-4 KNT INFORMATION

(Filed Apr. 20, 2001)

I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse ADRIAN MARTELL DAVIS of the crime of **Domestic Violence Felony Violation of a Court Order**, committed as follows:

That the defendant ADRIAN MARTELL DAVIS in King County, Washington on or about February 1, 2001, did know of and willfully violate the terms of a court order issued on July 6, 2000 by the Pierce County Superior Court pursuant to RCW chapter 10.99 for the protection of Michelle McCottry by (a) intentionally assaulting the said Michelle McCottry;

Contrary to RCW 26.50.110(1), (4), and against the peace and dignity of the State of Washington.

NORM MALENG
Prosecuting Attorney

By: /s/ Charles K. Sergis
Charles K. Sergis, WSBA #29364
Deputy Prosecuting Attorney

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

Full Text of Tape Recording in Exhibit 2

This is Liz Hennekay of the Valley Communications Center. Today's date is February 6, 2001, and the time is 1340 hours. The following taped incident has been recorded from the Valley Communications master disk of February 1, 2001 at 1154 hours.

911 Operator: 911. Hello, 911.

[unknown] [Hang up] . . . *[unintelligible]*

[new phone call; ringing]

911 Operator: Hello.

Complainant: Hello.

911 Operator: What's going on?

Complainant: He's here jumpin' on me again.

911 Operator: Okay. Listen to me carefully. Are you in a house or an apartment?

Complainant: I'm in a house.

911 Operator: Are there any weapons?

Complainant: No. He's usin' his fists.

911 Operator: Okay. Has he been drinking?

Complainant: No.

911 Operator: Okay, sweetie. I've got help started. Stay on the line with me, okay?

Complainant: I'm on the line.

911 Operator: Listen to me carefully. Do you know his last name?

Complainant: It's Davis.

911 Operator: Davis? Okay, what's his first name?

Complainant: Adran

911 Operator: What is it?

Complainant: Adrian.

911 Operator: Adrian?

Complainant: Yeah.

911 Operator: Okay. What's his middle initial?

Complainant: Martell. He's runnin' now.

[unintelligible]

911 Operator: Listen, listen. What direction is running?

Complainant: He's in a car.

911 Operator: What car?

Complainant: I don't know.

911 Operator: What color?

Complainant: It's blue or gray or somethin'.

911 Operator: What direction?

Complainant: He's riding up the street.

911 Operator: Okay. What direction?

Complainant: Goin' down, this is a dead-end street.

911 Operator: It's a dead-end street, so he's going out the dead end?

Complainant: Yeah.

911 Operator: Is he alone?

Complainant: No.

911 Operator: How many people in the car with him?

Complainant: I don't know. He just ran out the door after he hit me.

911 Operator: Okay. Do you need an aid car?

Complainant: No, I'm all right.

911 Operator: Okay sweetie.

[redaction]

911 Operator: Stop talking and answer my questions.

Complainant: All right.

911 Operator: Okay. Do you know his birth date?

Complainant: 8/13/65.

911 Operator: Okay, I'm having trouble understanding you.

Complainant: 8/13/65. I've gotta close my door. My . . .

[child's voice in background] [unintelligible]

Child: Hi Daddy.

911 Operator: Hi. Can I talk your mommy?

Child: Yeah.

911 Operator: Okay. Go get mommy. Thank you, sweetie.

Child: *[unintelligible]*

911 Operator: Okay. Go get mommy.

[child's voice in background] [unintelligible]

2nd Child: Hello.

911 Operator: Hi. Where's the grownup in the house.

2nd Child: *[unintelligible]* my mommy.

911 Operator: Where's your mommy. Is she inside or outside the house?

2nd Child: Uh, walking(?).

911 Operator: She's where.

Complainant: Hello.

911 Operator: Hi. We're gonna check the area first, okay? And then they're gonna come talk to you. Is this your ex-husband or a boyfriend?

Complainant: Yes.

911 Operator: Well, which one – ex-husband?

Complainant: Boyfriend.

911 Operator: Okay, sweetie. Did he force his way into the house – or . . .

Complainant: No. I'm movin' today. He said he was comin' to get his stuff. Somebody else came over here, so he tried arguing with me about that. So then I told him, "Look, I gotta go. You gotta go."

911 Operator: Um-hmm.

Complainant: So then he jumped up and started beating me up in front of him. I don't know what he was trying to prove.

911 Operator: Okay, . . .

[radication]

Complainant: . . . I told him not to come.

911 Operator: Okay.

Complainant: I told him over and over.

911 Operator: Okay. Okay. Take a deep breath. I need to find out restraining order, so I need your last name. What is it?

Complainant: M-c-C-o-t-t-r-y.

911 Operator: M-c-C-o-r-t

Complainant: M-c-C-o-t-t-r-y.

911 Operator: Okay. And your first name?

Complainant: Michelle.

911 Operator: Michelle. And your middle initial?

Complainant: I don't have one.

911 Operator: Okay. What's your birth date.

Complainant: 5/10/69.

911 Operator: Okay. Is your door locked?

Complainant: Yes.

911 Operator: Okay.

[redaction]

911 Operator: . . . put that in the call. They're gonna check the area for him first, and then they're gonna come talk to you. Okay.

Complainant: All right.

911 Operator: Okay. Bye-bye.

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON, Plaintiff, vs. ADRIAN DAVIS, Defendant.	No. 01-1-02794-4 KNT COA No. 49679-4

PROCEEDINGS BEFORE
THE HONORABLE JAY V. WHITE

August 28, 2001
Kent, Washington

NICOLE GAINES, ATTORNEY FOR THE PLAINTIFF

MARY ELLEN RAMEY, ATTORNEY FOR THE DEFENDANT

* * *

[5] THE COURT: All right. The 911 tape – is there an issue concerning the 911 tape? Have you had the opportunity to hear that as yet, Ms. Ramey?

MS. RAMEY: Yes, your Honor. I just had an opportunity to listen to the tape. There are several issues regarding the tape. There's matters that are detrimental to the defendant and it should be excluded under the rules of evidence.

THE COURT: All right. So it sounds like in your view then we would have a hearing on whether or not the

911 tape is admissible as an excited utterance or on some other ground.

MS. RAMEY: Well, your Honor, I have no problem with the 911 tape or even the foundation for the tape.

The problem is that in the tape there are statements made by the caller relating to prior contacts by the police with Mr. Davis.

And I believe that they would be extremely prejudicial to him if the jury were to hear those statements.

[6] THE COURT: All right, Ms. Gaines do you have an indication on what the State's position is on that concern?

MS. GAINES: And I understand what her concern is and as I mentioned to Ms. Ramey I too concur that there are some statements in there that we're going to have to redact out. The tape is approximately five minutes long?

MS. RAMEY: Five minutes.

MS. GAINES: If the Court wants to take five minutes to listen to it we can probably resolve this and then recess for the day.

THE COURT: What I would suggest is this, I mean if Counsel can agree what will be played then I don't need to involve myself.

So perhaps you should see whether you can agree to redactions, and we can make the record clear that that is exactly what has occurred.

If for the record do you think it's useful for that tape to be played and made part of the record we can do that by playing it through our system here.

But I don't think that's necessary because you can get a copy admitted and then also a redacted version. So unless there's a need for rulings – so I thought I'd wait and see if there's a dispute.

If you cannot agree then sure, I would listen to argument from Ms. Ramey and make decisions as to how it should [7] be redacted.

MS. GAINES: All right. Ms. Ramey can do that this afternoon. And I think then – and I just want to make something – my understanding clear. It's my understanding then, Ms. Ramey, that you're not objecting to the authenticity of it, it's just that we need to discuss redacting portions of it?

MS. RAMEY: That's correct.

MS. GAINES: And you don't have a problem with it being admitted as an excited utterance as long as we redact it?

MS. RAMEY: According to the rules of evidence, a 911 tape comes in as an excited utterance as an exception to the hearsay rule. The issue is whether or not everything comes in if it's more prejudicial than probative.

THE COURT: All right. The Court is anticipating there may not be any disagreement here. It sounds like – I think you're making the correct approach there.

The record will indicate though, as I understand, that the defense will not be objecting to the authenticity of the tape.

It will not be necessary for the State to call Liz Haniky to testify exactly, you know, how the tape was made and that sort of thing –

MS. RAMEY: That's correct, your Honor.

THE COURT: And there is not a general objection [8] to the admissibility of the tape, but the defense reserves the right to request redactions in the event there's not agreement with the State.

MS. RAMEY: That's correct.

THE COURT: All right. I think that's a fair way to indicate our progress as far as that is concerned.

Are there – I'm just skimming this – I can't recall, is the State seeking the admission of any other statements as excited utterances other than what may be on the 911 tape?

MS. GAINES: Yes. There were statements made to the investigating officers by the victim. And it would be the State's approach that we could deal with that at the time during trial.

I mean obviously I lay the proper foundation and then we could deal with it at trial rather than having an actual hearing – pretrial hearing – in that matter if that is okay with Ms. Ramey and the Court.

THE COURT: Ms. Ramey, what's your view toward this issue?

MS. RAMEY: Well, your Honor, my understanding is that Michelle McCottry is going to be here. There was some issue as to whether or not she was going to be here, and the State indicated that they could prove their case without Ms. McCottry.

I think the issue becomes what is an excited utterance [9] as an exception to the hearsay rule? If she's here to testify she can testify.

The officer can testify as to what he saw and any excited utterances and what he, you know, the report in general.

THE COURT: Well, again, what I am trying to determine is whether there's a need either pretrial or perhaps during the trial for there to be a hearing outside of the presence of the jury so that the Court can rule whether or not statements made to the officer would qualify as excited utterances.

Counsel are more familiar with this than I am. It may be that what you're saying to the Court is that you don't have any objection to the officer testifying to what she said to him when she first encountered him on the assumption that she's testifying, but I don't know if that's strictly the proper analysis. What is your position?

MS. RAMEY: Well, your Honor first of all we want to make sure that she is going to testify, and I presume she'll be your first witness?

MS. GAINES: And that is my understanding that she will be present. When I spoke to her last night and this morning she indicated that she would be here for trial.

MS. RAMEY: So she would be able to testify and he would then be able to testify because she would be subject to cross-examination so I don't think we have an issue if she [10] testifies.

THE COURT: All right. I guess the way to handle this then is that we're anticipating that Ms. McCottry will be the first witness.

MS. GAINES: Yes.

THE COURT: And that at the point that the State calls the officer in question I guess that would be the point if the defense had any issue that they wanted to bring to the Court's attention.

That's when you should do it so that I would have the opportunity if persuaded or appropriate to conduct a hearing outside the presence of the jury.

MS. RAMEY: That's correct.

THE COURT: But you may be indicating that you do not think it will be necessary depending upon the testimony that you hear previously. So, that issue for the time being is reserved.

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON, Plaintiff, vs. ADRIAN DAVIS, Defendant.	No. 01-1-02794-4 KNT COA No. 49679-4

PROCEEDINGS BEFORE
THE HONORABLE JAY V. WHITE

August 29, 2001
Kent, Washington

NICOLE GAINES, ATTORNEY FOR THE PLAINTIFF

MARY ELLEN RAMEY, ATTORNEY FOR THE DEFENDANT

* * *

[50] MS. RAMEY: The other is the motion to exclude 404b, ER404b, evidence any prior bad acts. There's issues, at least, that can be combined with this number five motion of mine to sanitize the tape.

I presume that the tape has been sanitized. I presume that the reference to the incident two days before [illegible]r incident has been excluded from the tape. And I don't know of any other 404b testimony –

THE COURT: So, it's a motion moot as far as you know?

[51] MS. RAMEY: Right, I –

THE COURT: There's nothing to indicate the State is intending to present any 404b evidence?

MS. RAMEY: Well, the thing is that I want the prosecutor to caution the witness, Ms. McCottry, about that because the two of them have been in a relationship for a long, long time. And it's possible that something could be blurted out about some prior –

THE COURT: I think that's appropriate and Ms. McCottry should be advised of the redactions made to the 911 tape. It sounds like some agreement has been made in that regard; is that correct?

MS. GAINES: That is correct, your Honor, and yesterday the Court asked us to agree and we did agree on redactions to the 911 tape.

The only redaction that Ms. Ramey asked is that the references to the police just being out there two days prior be removed. That is in the process of being removed at this time.

And then what I would say to Ms. Ramey is that tomorrow morning we'll just take five minutes before we actually go back into session and I'll play the redacted version for her to make sure that it meets with her satisfaction.

* * *

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON, Plaintiff, vs. ADRIAN DAVIS, Defendant.	No. 01-1-02794-4 KNT COA No. 49679-4

PROCEEDINGS BEFORE
THE HONORABLE JAY V. WHITE

August 30, 2001
Kent, Washington

NICOLE GAINES, ATTORNEY FOR THE PLAINTIFF

MARY ELLEN RAMEY, ATTORNEY FOR THE DEFENDANT

* * *

[14] MS. GAINES: The other thing that the Court needs to be aware of is that there was a change of events yesterday, and at this time the State would be asking for a recess.

And the Court can deal with this and the way the Court feels – obviously you're the Court – once I explain.

Yesterday as the Court knows I was expecting Ms. McCottry to appear. She did not. The victim's advocate and I did some additional research yesterday afternoon as to why she did not appear.

The victim advocate was able to locate Ms. McCottry [15] late yesterday afternoon, and what the victim relayed to the victim advocate was two things.

One, that she was at Harborview Hospital yesterday afternoon, and this is relayed through a phone message so we still do not have completely all of the details.

The advocate did tell me that she believed that's where Ms. McCottry was because she could hear hospital pages in the background on the voicemail message.

And we don't know the reasons for that or what exactly has happened because we haven't been able to talk to her yet today.

Two, she also relayed a message that she needed to speak with the advocate because she was in fear. And her reasons for her fear were that allegedly there had been a phone contact between herself – we believe it was phone contact, we're not sure if it was phone or personal exactly how the contact occurred yet.

But there was potentially either a phone contact or in person contact, some type of contact between herself and the defendant where the defendant told her that if she appeared in Court his defense attorney was going to make her out to be a liar, and that he would make sure that their children were taken away from her, things of that nature.

Once again, your Honor, these are my words because I haven't exactly spoken to Ms. McCottry to actually verify the [16] exact words that were said.

THE COURT: By whom?

MS. GAINES: By the defendant to Ms. McCottry. With that said this morning – I got that message this morning. I'm in the process of researching it. I've requested the phone records from the jail.

I'm also going to request to see whether or not Ms. McCottry appeared and had contact with the defendant at the jail yesterday.

I know that the Court has lifted the no contact order in this case, but it's my understanding that the no contact order out of Pierce County, which is the order that this particular case is based on, is still in effect.

And then also given that there were allegedly additional threats made I'm asking for a short recess, which basically would be until Tuesday morning, to have additional time to research into this, to talk to Ms. McCottry personally to find out exactly what has occurred, what's going on, why she's at the hospital, and to also get the records from the jail to find out.

Because if that is indeed the case the State will be adding charges of at least a violation of the no contact order assuming, like I said, the Pierce County no contact order is still in effect.

And second of all potentially intimidating a witness [17] if it was in fact true that those threats were made and we can verify that there was some contact between the two.

I know that from the jail there was a phone block put on Ms. McCottry's old phone number. I don't know that there's a phone block on her current phone number. In fact I tend to believe that it very well may not be.

I would ask that the Court authorize an order to the jail blocking any contact from the Regional Justice Center jail to Ms. McCottry's new phone. And I would ask for a short recess in order to investigate this.

I'm very concerned because as I stated to the Court although Ms. McCottry hasn't been excited about participating in this trial she's never indicated that she wouldn't.

She's always been very prompt about appearing when I've asked her to appear, returning my phone calls, returning the advocate's phone calls. She's come into my office and spoken to me several times voluntarily as well as on my request.

So I honestly can say to the Court that I don't think that this is necessarily a stall tactic or anything like that because she's never done anything like this before. She's always been prompt and polite about appearing when requested to do so.

THE COURT: All right, Ms. Ramey, any response to the State's?

[18] MS. RAMEY: Yes, your Honor, we would strenuously object to any delay of this trial. We want to get this case over with as quickly as possible.

I suggest that Ms. McCottry be brought in at the noon hour so that I can talk to her, and can find out what's going on.

Your Honor, Mr. Davis totally denies making any contact. He indicates that there is a block on her phone, that her phone number is the same.

And as far as the representation that she's afraid, he's in custody. I mean it doesn't make any sense.

And as far as statements such as well, his attorney would make her out to be a liar or whatever I simply have not – I don't want to be a part of this. I mean, those are words that are not my words. And Mr. Davis indicates they're not his words either.

And as far as taking kids away, I mean that it just doesn't make any sense. So I would ask that the Court continue with jury selection and have Ms. McCottry available to testify in this case at noon – I mean after lunch, which would be approximately 1:30.

Your Honor, again I want to impress upon the Court that we need to know if she's going to be here or if she's not going to be here. If she's not going to be here we need to know how the State is going to proceed without her.

[19] This is not a situation like in some cases involving domestic violence where there's what is called the Smith affidavit where the person testifies or gives a statement; it's then notarized, and there's a case called Smith that allows that to be brought into evidence.

If Michelle McCottry doesn't testify in this case all the State has is the police officers and the 911 tape, which I believe would be insufficient to get this case to a jury.

So I need to know because I need to voir dire these jurors, you know, asking them about, what about a case involving violation of a no contact order where the person that's alleging the contact isn't here.

THE COURT: The Court notes that Mr. Davis denies any contact. Any objection, if there are additional

numbers for Ms. McCottry, to the Court signing an order including those numbers on the phone block from the RJC?

MS. RAMEY: If there are –

THE COURT: If there are any additional numbers for Ms. McCottry, any objection to the Court signing an order authorizing a phone block from the RJC to numbers of Ms. McCottry?

MS. RAMEY: No, your Honor.

THE COURT: All right. The Court would sign such an order. What is your response to the other request made by the defense?

[20] MS. GAINES: I too understand the defense position of wanting to get this trial started and continue with voir dire.

But I too have concerns because Ms. Ramey is asking me to do something that I just don't have the information to do.

I haven't talked to Ms. McCottry. I don't know what is going on other than what has been relayed to me through the victim advocate through phone messages from Ms. McCottry.

I need additional time to go out with my detective and talk to her and find out what's going on. Like I said, this incident of her not appearing yesterday is out of character for this case.

I've been working with Ms. McCottry since the end of May on this case, and like I said, she has never done

anything like this. That indicates to me that something is very wrong here.

And she's been very honest and frank about things that have happened, and I honestly believe that something has occurred that is causing her great fear. And I need additional time to investigate that and find out what is going on here.

THE COURT: What is your response to Ms. Ramey's contention that she needs to know what's going to happen with Ms. McCottry in order to frame her questions on voir dire?

MS. GAINES: I agree. I mean I too need to know what's going to happen to frame questions because I was [21] proceeding with this case with an understanding that Ms. McCottry would be here.

THE COURT: I'm not sure what the presence or the absence of a witness has to do with whether or not there's some bias on the part of a juror that would not permit them to hear the case.

MS. GAINES: Your Honor, with DV cases – please understand they're not your typical cases, and domestic violence has different connotations to different people.

And as one of the jurors even said yesterday when we were talking something about someone not being present and them changing their story, she said that would make me wonder if they were credible. And if we're going to have an issue I think it's very important for both defense and –

THE COURT: Well, why does it impair voir dire? I mean, can't these questions be asked hypothetically?

Jurors don't need to know one way or the other what's going to happen in this case.

MS. GAINES: They don't need to know, but I think I agree with Ms. Ramey. We need to know as far as what's going on, and just the whole mindset of being able to figure out if jurors are going to have an issue.

Yes, hypothetically could we ask questions one way or the other just to prepare ourselves for anything that could happen? Yes, we could.

[22] But I think that both the defense and State would be in a better position to actually appropriately pick a jury if we knew for certain what was going to happen.

I mean, the other thing is depending – I know the Court had made a ruling about the excited utterances, and there had been some mention of the fact that as long as she testifies. I don't know if Ms. Ramey is going to argue that if she doesn't testify that those statements shouldn't come in.

And if the Court's going to revisit that issue and make a different ruling that's going to impede the State's case and potentially mean that we wouldn't be able to go forward.

There are serious ramifications here, and if that was the case where the Court was going to revisit the Court's ruling about allowing excited utterances in then we would pick a jury.

They would potentially be here over the weekend, and then we'd get back Tuesday morning, and we would be dismissing. There's just a lot of things that have occurred in the last 24 hours that are unusual.

THE COURT: I don't think I affirmatively ruled that I was going to allow, as excited utterances, statements she may have made to the police. We didn't get that far.

As I understand it Ms. Ramey just indicated that she wouldn't have any objection to the statements if she were going to testify. I haven't made a ruling as to those. I've only made a ruling as to the 911 tape.

[23] MS. GAINES: And that's my point.

THE COURT: If there's other statements so far Ms. Ramey is indicating there would be no objection to those statements.

She predicated it on whether or not Ms. McCottry testifies, but I believe that I remarked at the time that it's an independent subject.

It doesn't make any difference whether he testifies or not in my view as to whether or not the statements made to the police qualify as excited utterances, but I've not made any ruling on that.

MS. GAINES: Right. And that's what I'm saying. The Court hasn't made a ruling and the Court – my understanding was the Court was basically reserving that?

THE COURT: There was nothing before the Court. There was no motion being made. There was an indication of no objection in the event Ms. McCottry testified, which may well be a perfectly reasonable trial strategy. I have no way of evaluating that.

But I believe I did indicate at the time, I said well, all right, but I didn't make a ruling. I'm not saying I would not make such a ruling.

And we would have to have the appropriate hearing so I could understand what she said under what circumstances, and hear what the police officers actually say about it, and then I [24] would make a ruling if they qualify as excited utterances.

But I haven't made any ruling. I've just heard from defense that they won't object to statements made to the police officers if she does appear. If she does not appear they may have an objection.

MS. GAINES: And that is exactly my point. And I think that's also Ms. Ramey's point is, is she going to appear? If she's going to appear then I think Ms. Ramey is prepared, as she stated yesterday to go forward, and we can deal with her statements.

If she doesn't appear I think it's – and I don't mean to speak for you, Ms. Ramey – but it's my understanding that you may want to bring that motion, but you want to know whether or not she's going to appear or not appear.

And I can't give you that information because I simply don't know at this point. And I think it's best that Ms. Ramey address that.

THE COURT: Ms. Ramey?

MS. RAMEY: Your Honor, if she doesn't appear I think I have the, basis of what would be a Knapstad motion whereby everybody would agree that this is the evidence and then the Court would decide that given that

evidence is this enough evidence to go to a jury? And then that would be the basis for a motion to dismiss.

I presumed relying on Ms. Gaines' word that the [25] person, Ms. McCottry, was going to be in her office yesterday at 1:00 o'clock. I have spoken in the past to Ms. McCottry several weeks ago – it may even be months ago – and I haven't spoken to her recently.

But I think we need to know without wasting the Court's time, the jury's time whether she's going to be here. And if she's under subpoena she should be here. And if she isn't under subpoena she should be.

And it's possible that if the State wants to proceed by way of a material witness warrant to haul her in they may have to do that. But at this point we need to know. We're in the dark, and it's not fair for the defense to have to proceed in the dark.

THE COURT: All right. The Court at this time will deny the request for a recess. As far as voir dire, it seems to me that Counsel can inquire appropriately as is often done with jury panels in various hypotheticals to determine whether one situation or another would affect their ability to be fair and impartial.

It's a little bit of a gray area because questions are not proper which invite jurors to speculate about what they're verdict might be as certain facts are shown.

But I think that one can, and it appears that both Counsel are agreed, make inquires as to whether they might have some prejudice or bias based upon whether or not a person [26] appears.

It's similar to the inquiry of whether there's some bias or preconceived idea in the event a defendant decides not to testify. The jurors don't know one way or the other what that decision is going to be, but on the other hand inquiry is made in voir dire so that Counsel can make informed decisions about preemptories for either alternative.

It seems to me that I do not delay matters on that issue. If Ms. McCottry in fact does not appear, if there's a motion from the defense that's viable I can certainly consider it at that time.

* * *

IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON, Plaintiff, vs. ADRIAN DAVIS, Defendant.	No. 01-1-02794-4 KNT COA No. 49679-4

PROCEEDINGS BEFORE
THE HONORABLE JAY V. WHITE

September 9 4, 2001
Kent, Washington

NICOLE GAINES, ATTORNEY FOR THE PLAINTIFF

MARY ELLEN RAMEY, ATTORNEY FOR THE DEFENDANT

* * *

[46] THE COURT: Well, that may be the next thing we will be talking about. Let me make some rulings concerning this excited utterance issue, and then parties will be in a position to determine where they are.

It's my view that the 911 recording does qualify under the excited utterance exception to the hearsay rule. It appears that there may be agreement that some further redaction need be done.

I believe the parties already agreed to this, but I would agree to redact the references to the two days prior incident.

I think that's the area where there was some concern and I felt agreement, but I believe the balance of the tape is admissible as an excited utterance.

I am not persuaded that the statements to the officers qualify as excited utterances. I know that these are difficult, issues. I know there are cases where reports immediately following an assault have been admitted as an excited utterance.

My concern in this particular case although it does appear the officer was there promptly thereafter. In listening to his description of the circumstances and the type of detail that Ms. McCottry was offering I was left really with the feeling that it was more of a narrative of a past event although a very recently past event.

She was most tearful when questioned by the officers. [47] That seemed to provoke a major thing. She had a lot of things on her mind. It's very difficult when we get to the point where the event is over and she's now turning her attention to the care of three children, apparently all quite young two in diapers as the officer indicated, she's got that as a distraction.

She's trying to pack. Her central concern was trying to leave, was trying to pack. This does indicate perhaps some fear or stress. Certainly there can be testimony about her demeanor, and certainly the officer can testify about any observations he made about physical injuries that appeared on Ms. McCottry.

But in terms of her statements she, at this point, was focusing on a lot of things. She's packing; she's dealing with children; she had an argument with Mike; she had an encounter with Mr. Davis, which she alleges was physical.

She was able to describe to the officer a sequence of events, which I probably will not be able to recite with full accuracy, but she was able to explain that he came to her house, that she was involved in an argument with Mike, that he initially sat down on my couch and was holding a child, that Davis then attempted to get into the argument, he then set the child down and rushed at her and struck her.

And again I feel that based upon the totality of the testimony that's given I think that it would be difficult for [48] the Court to decide that all of these statements just automatically come in under the hearsay exception for an excited utterance.

Some of it clearly was referring to other events to the extent that she got into some of the past history as well two days ago, the other report with the officer, and that sort of thing.

She was responding to questions. Those were causing stress. I can't say that these were spontaneously arising out of the immediate aftermath of whatever occurred between her and the defendant so I will not permit Officer Davis to quote her –

MS. GAINES: You mean Officer Jones?

THE COURT: Officer Jones, thank you for the correction. Officer Jones to quote statements that she made describing the event, but certainly he can testify about her demeanor and any other personal observations that he is able to make. The 911 tape, I think, is clearly admissible.

MS. GAINES: Your Honor, one other thing. In regards to her history it wasn't the State's intention to

actually elicit any type of information regarding history of Mr. Davis. In fact we even agree with Ms. Ramey that we took off several sections, but I missed one section that needs to come off.

THE COURT: All right, so that redaction will take it off.

[49] MS. GAINES: Right. And also it wasn't my intention to elicit that information from Officer Jones either. And I guess I would just like a little clarification.

Is the Court ruling that the time frame in which these statements were made was so far removed from the quote-unquote startling event, meaning the allegation that Mr. Davis was present and assaulted Ms. McCottry, that that time frame was so far removed that these statements Ms. McCottry made would not qualify as far as timing being spontaneous?

THE COURT: I don't know if it's productive for me to continue to state rulings. The record ultimately speaks for itself in terms of what the Court heard. But again I would say that certainly this was close in time.

I'm not arguing that it's remote in time, but I'm satisfied under the circumstances that it appears to me that because of the details she was able to offer, because of the attention that she was giving to other matters that the statements made to the officer were more in the nature of a narrative description of a past event to Mark Jones.

And that it was not spontaneously arising out of the alleged recent assault. Her greatest stress seemed to occur in responding to questions.

I have no question that it was reviving some painful and immediate memories, but again I think that the type of detail that she offered it would be improper for the Court, you [50] know, where would one draw the line?

It would be improper for the Court to say this entire narrative of what she says occurred down to details of being on a couch and holding a child and something that happened two days earlier I do not think it would be proper for the Court to just on a wholesale basis say this all constitutes an excited utterance.

I don't think that is the kind of circumstance that that rule addresses. I think it's extremely difficult. It's hearsay, and it's extremely difficult if not impossible for the jury to evaluate the credibility of these statements so there are a number of factors, which have persuaded me that it does not qualify.

MS. GAINES: And your Honor, for the record with all due respect to the Court, reading from tag-ons directly under the excited utterance portion it specifically states, "a statement may qualify as an excited utterance even though it is made in response to a question."

THE COURT: I agree. There's no question. We can probably find a case for every circumstance. And I agree that the mere fact that it was in response to a question would not take it out of the exception, but it certainly is a factor that the Court can consider.

It's a matter of exercise of discretion under this rule in determining whether in the circumstances if this case it [51] qualifies as an excited utterance.

In another case the fact that a question was involved might not remove it, but on the other hand that is part of the context.

And likewise it does not say that everything that's elicited by an investigating officer by questions are excited utterances. So that's my ruling under the circumstances of this case.

I know that both Counsel are strong advocates for their position, but that's the distinct feeling that I had as I listened to the officer that it would just simply would not be a proper application of the hearsay exception for excited utterances to permit this detailed narrative into evidence.

There's a lot of other things that he can certainly testify to in terms of what he personally observed.

MS. GAINES: And one other thing I just wanted for the record to state that that is from tag-ons that in citing State v. Hieb. That's cited as 39 Washington Appellate 273. It's a 1984 case.

THE COURT: I saw the note.

MS. GAINES: I just need to put it for the record.

THE COURT: I appreciate that, and we're looking at the same thing. Reversed on other grounds and 107 Washington 2nd 97.

[52] But again, yes it is not excluded. The fact that questions are asked does not prohibit application of the hearsay exception for excited utterance.

So I am not ruling that the fact that her statements were in response to questions is what takes it outside of

the hearsay exception. But that is part of the context that the Court certainly can consider.

And I believe I've, as well as I can, trial judges of course have to make rulings based on testimony they've just heard. They don't have the luxury that perhaps the Court of Appeals might have of reading the entire record.

But I think the record does support the Court's ruling and would not constitute an abuse of discretion for the Court to decline to admit the narrative descriptions by Ms. McCottry to the officer as excited utterances. I just don't believe that they qualify.

* * *

[59] MS. GAINES: Your Honor, there's a couple things [60] we need to address pretrial before we bring in the jury. First of all, I have made redactions to the 911 tape.

Ms. Ramey heard the redacted 911 tape before the Court took the bench and agreed that it is acceptable to the defense. She also, as previously noted, agreed that it's authentic and so therefore it's admissible.

Second of all –

THE COURT: Is that correct, Ms. Ramey?

MS. RAMEY: Yes, your Honor.

* * *

[102] THE COURT: Oh, I regret – I will trust to your – I had intended that the jury see that, but the record will reflect the State has rested. We will make that record in their presence when they are next in our presence. Ms. Ramey, anything?

MS. RAMEY: Well, your Honor, at this time I would renew my motion to dismiss. This is after the evidence has been put forth by the State. The only evidence is evidence of the 911 call, which somebody purports to be Michelle McCottry, and she accuses Adrian Davis of jumping on her and beating on her.

Your Honor, I have not been able to cross-examine that 911 tape. Obviously Michelle McCottry has either disregarded the subpoena she was served with and has chosen not to come to Court.

And the State has chosen not to compel her to come to Court to tell the jury in person what occurred. If that were the case I would have been able to cross-examine her and possibly raise doubts as to what happened, her state of mind, what, for example, the defendant was wearing on the date of the incident, the circumstances surrounding the incident.

And obviously it would have been my goal to try and prove that the defendant was in fact not there and not in violation of the no contact order. As far as cross-examining [103] the police officers, they were not present when the alleged incidents occurred so cross-examining them was of no benefit.

There was no one in the courtroom that said that Adrian Davis is the one that was there on February 2nd. And we have allegations that are crucial for the felony violation of the no contact order that an assault occurred.

All we have is speculation, and we have a 911 tape. It's possible that this incident occurred several days ago. We don't know. And the date that it's charged is February

1st. So for those reasons we would ask that the Court dismiss this case against Mr. Davis.

THE COURT: All right. Thank you, Ms. Ramey. Ms. Gaines?

MS. GAINES: Your Honor, in a half time motion the Court must view the evidence in the light most favorable to the non-moving party, which in this situation would be the State.

And as such the State believes that I have made a prima facie case to allow this case to go forward. I have testimony from two officers that the injuries they observed on Ms. McCottry as well as the damage to the rocking chair and to the wall were recent.

Officer Jones even indicated that the bruising appeared to be occurring at the time while he was there. Officer Tamanaha has 14 years of experience and also indicated [104] that based on his experience those injuries were recent.

We have a 911 call to the 911 dispatch made at 11:56 a.m. The officers responded to the scene four minutes later at noon. They identified Ms. McCottry.

The testimony has been again that the evidence that they viewed was recent meaning the injuries to her as well as the damage to the house.

Also as far as identification we have a 911 call and tape that identified the defendant as the person who caused the damage and the injuries to Ms. McCottry.

We have the Department of Licensing photo as well as the no contact order, which also contains the same date of birth and description of the defendant.

And we have an officer, Officer Jones, who identified the person in the Department of Licensing photo as matching the description of the person here in Court today, Adrian Davis, the defendant.

We also have a 911 call made by Ms. McCottry at the time of this incident identifying Adrian Davis with the date of birth of August 13th, 1965, the person who was her ex-boyfriend and the subject of a no contact order as the person who assaulted her on February 1st, 2001.

As such it's the State's position that I have made a prima facie case in this case, and this case should proceed to the finder and the trier of fact.

[105] THE COURT: Your reply?

MS. RAMEY: Your Honor, I will just reiterate what I said in my motion. Failure to be able to cross-examine is crucial and is the bedrock of our criminal justice system. And because Mr. Davis cannot confront his accuser he's denied his constitutional rights.

MS. GAINES: And if I may briefly reply to that?

THE COURT: Thank you.

MS. GAINES: Your Honor, under Davis, and that's the case I cited, it is stated in there as well as in numerous other cases that the excited utterance is not a violation of the defendant's constitutional right to confront his accuser.

It specifically states, I believe in Davis, that as long as the person who is relating the declarant's statements is available to the defense for examination then that is all that is necessary.

Here we have Officer Jones who was present. We have the 911 tape that was made and that was allowed in as a business record that's available for the trier of fact to evaluate.

THE COURT: Anything further, Ms. Ramey?

MS. RAMEY: Your Honor, the officer is not available for cross-examination as to what the declarant said because that was excluded by the Court in an earlier ruling. So we're left with the 911 tape, and that cannot be cross-examined.

[106] So the declarant is unavailable for cross-examination and there really is no person that heard this statement. It's just simply a 911 tape and so there is no ability to cross-examine it. And it's extremely prejudicial.

I would further state, your Honor, that in searching through the case law I have been unable to find any case that supports a 911 tape being the basis for a criminal law violation coupled with the responding officers to the scene.

And the reason I haven't been able to find anything is because I believe they don't exist. All of the cases seem to have lots of other corroboration.

MS. GAINES: Your Honor, I point you to, in Tegland's if you have the 2001 edition, does the Court?

THE COURT: Yes.

MS. GAINES: Page 361, the top of it, it says: "Example, admissible in prosecution for assault statements by a witness during the witness's telephone call to the police headquarters were excited utterances.

"The Appellate Court noted that the witness was crying and agitated throughout the conversation and that the call was made contemporaneously with the shooting or shortly thereafter."

And that's State v. Ross at 42nd Washington Appellate 806 1986 case. Obviously I have not had an opportunity to review this, but based on what is stated in Teglund's I believe [107] that that is the situation we're looking at here.

We know the 911 call was made at 11:56. We hear the victim on the tape saying he's running, he's running right now, he's running out the door, he was just here, and so it would seem that that case would apply. And granted I don't have a copy of it – oh, the Court is getting a copy of the case to review.

THE COURT: Did it involve a 911 recording? It probably involved somebody who was able to testify and be cross-examined on having heard the statement alleged to be an excited utterance.

MS. GAINES: And I honestly don't know about that at this time.

THE COURT: What I was also looking for – I am familiar with the comment that you made previously, and I'm just trying to spot the authority for it where there's a case that's indicated that the right of a defendant to cross-examine is adequately preserved if the 911 comes

under the hearsay exception, but the person who heard the statement is available for cross-examination.

Ms. Ramey has raised the issue of here we have a 911 tape with no witness to be cross-examined as to what he or she heard or the circumstances or basically exploring more of the context of these statements. Where in the book do they refer to that?

[108] MS. GAINES: I didn't get that out of the book. That's just based –

THE COURT: Just general?

MS. GAINES: Just general.

THE COURT: I have seen that statement somewhere. It may be included in the hardback text somewhere.

MS. GAINES: The other thing, your Honor, is then that's an objection that actually should have been made at the time that the 911 tape was offered as admissible because by waiting to this point what the defense has done is basically raised an issue that they've already stipulated to.

What should have been done is if that were her point she should have objected to the 911 tape coming in. And it should have been objected to at that time. So that's an untimely objection and an untimely argument.

THE COURT: I think the defense has objected to the 911 tape, but the objection has been overruled based on the excited utterance exception to the hearsay rule.

MS. GAINES: I mean, maybe I misunderstand, but that wasn't my understanding of what her objection was or that she was even objecting.

MS. RAMEY: Your Honor, we were not objecting to the admissibility and the foundation. We were not going to require the person to come in that took the 911 tape that would authenticate it. That's different than the contents of it. We [109] have always continued to object to the contents of it.

And the other issue is that we did not know that Ms. McCottry was not going to testify. At the beginning of this case we were under the impression that she was going to testify.

And she was supposed to be here on the 28th at 1:00 o'clock in the afternoon. She didn't appear, and it was not until Friday of last week when I ran into the prosecutor on another case that she indicated that Ms. McCottry was not going to be here. So that if Ms. McCottry was here to testify then I would have probably not an objection to the 911 tape.

MS. GAINES: Your Honor, that still goes to – what she's arguing is that the 911 tape is inadmissible and the Court has ruled all along that it was admissible and so what she's asking the Court to do is to reconsider the Court's own rulings.

And if the Court is going to do that and it's going to rule adversely to the State then the State should be afforded an opportunity to re-open its case and present such witness if need be because what should have occurred –

THE COURT: A witness to do what?

MS. GAINES: Huh?

THE COURT: Which type of witness?

MS. GAINES: I mean if the Court is ruling that because we don't have the 911 operator to actually come in and say –

[110] THE COURT: That would not be the issue.

MS. GAINES: Okay.

THE COURT: Give me just a minute. All right.

MS. GAINES: Your Honor, can I just briefly make a couple more comments?

THE COURT: Yes, you may.

MS. GAINES: Your Honor, the other thing that the Court should consider is the declarant in this situation is the 911 tape. It's one of the reasons why the Court let it in because it is clear that the victim is crying on the tape. She's hysterical.

You can hear her excitedness when she's relaying the incidents to the 911 operator. It obviously is made close in time to the event because the officers arrive at 12:00 o'clock noon. The tape was made at 11:56.

She even states in the tape a present sense impression – he is running. That's a present sense impression when she describes that he's running down the street, it's a one-way street, and that he's getting into a car.

The jury can clearly evaluate the victim's demeanor on this tape, and they are free to do so and to assess whether or not this tape is credible based on what the jury has heard.

They're the trier of fact and that is their job to so [sic] in this type of situation. They can find that this 911 tape is not credible because they don't believe that the victim's [111] demeanor is such that would indicate that she's credible. That's for the trier of fact to do.

THE COURT: All right, anything further, Ms. Ramey?

MS. RAMEY: Your Honor, if that's the case then why even bother subpoenaing witnesses? Let's just try everything by 911 and that's the end of it.

THE COURT: All right, thank you. I think the following is the appropriate thing for the Court to do. I, unlike Counsel, have now had the opportunity to be the one most recent to read the case referenced by the State for the proposition that the phone call to police headquarters, which it turns out was a 911 call, is an excited utterance – State versus Ross, 42 Washington App, 206.

The interesting thing about that case when you read it is that one issue, of course, was the question of whether it was a business record in that case as in this case there's no challenge to the 911 tape as a business record.

The defense is conceding the authenticity of the 911 tape, and does not doubt the ability of the State to prove that it's an authentic business record.

The next issue is excited utterance. The Court has ruled consistent with State versus Ross that the statements made by the out-of-Court declarant, which is clearly Michelle McCottry, are excited utterances.

[112] The defense objected to that ruling, but the Court ruled that the 911 tape does qualify as an excited

utterance as in Ross. The Court's brief discussion of this is similar to what the State just referenced in the Teglund book.

At page 809 of the opinion, 42 Washington App, the Court simply says, This exception to the hearsay rule admits statements made while the declarant is under the exciting influence of an event where circumstances show no opportunity of deliberation or fabrication."

Omitting a citation the Court goes on the [sic] say, "It is apparent in listening to the tape that statements made by Ellis," who was the complaining witness in that case, I'm adding ", [sic] fall within the rule."

Continuing to quote the Court, "she is crying and agitated throughout the recorded conversation. And the phone call was contemporaneously made with the shooting or shortly thereafter."

They then proceed to a third issue, which is what the Court now recognizes the defense is raising, and that is the question of whether or not admission of the – even if the 911 tape does qualify as an excited utterance and even if the authenticity is not challenged.

The question is then whether or not where that is the only evidence placing the defendant at the scene whether or not the defendant has been, if the Court proceeds with the trial, is [113] deprived of his right of confrontation.

The Court in part states in beginning its discussion of the confrontation clause says, "Though Ellis' statements would be admissible in a civil case as an excited utterance they must pass muster under the confrontation clause to be admissible in a criminal case."

And the Court then goes on to say that, as far as I can tell in skimming it, the Court is adopting a rule in Ohio versus Roberts, which is a United States Supreme Court opinion at 4408 US 56 1980, which says first that the Court requires that the State either produce the out-of-Court declarant or demonstrate the declarant's unavailability. And second, the statement must bear adequate indicia of reliability.

Thinking aloud, there may be some indicia of reliability because it's a 911 tape and qualifies as an excited utterance. That's the whole basis for the exception of the hearsay rule.

But of greater concern is the apparent rule that the State must either produce the out-of-Court declarant or demonstrate unavailability. They go on in discussion in that particular case to say, "The State was aware that Ellis was available, but reluctant to testify.

"The State did not call her as a witness, but instead attempted to present her version of events by the recorded conversation on the tape. The trial Court reserved its ruling [114] at that time and did not admit the 911 tape until the following day when Ellis was not present to testify.

"The record is silent as to why Ellis did not appear on the second day of trial or what attempts were made to locate her. With this record this Court cannot find that the State made a good faith effort to procure Ellis to testify."

The other thing that was a problem in this case though even if you overcome the confrontation clause, but it would offer a possible means of distinguishing this case, which ended up resulting in a reversal.

But I think the other thing that offended the Court of Appeals in this case in the last part of the case they discuss yet another issue, which we frequently conduct and that was the jury room use of the 911 tape.

And in this particular case the trial Court did not retain any control over the number of times a jury would listen to the tape, simply allowed the jurors to have the tape and the tape machine, and they played it as many times as they wished.

I think that probably was influential to the Court as they were going along with the issues in that particular case, but they do conclude that the defendant Ross' right under the United States and State's Constitutions to confront witnesses was violated.

It would appear that the fairest thing the Court should do at this point is reserve its ruling to give Counsel [115] the opportunity to read the same case the Court has to determine if there are other authorities that might persuade this Court that the defense motion should be denied.

But I am interpreting the defense motion as a motion to dismiss under the confrontation clause. Is that a fair characterization, Ms. Ramey at this point?

MS. RAMEY: That's correct, your Honor.

THE COURT: The other thing that I would mention however, that I would also like addressed and that is the question of it may be enough if the tape comes in, but I have been independently inquiring myself what evidence there is of willful action on the part of Mr. Davis given the state of this record.

The Court certainly has to take responsibility for the ruling it made prohibiting the officer from recounting other statements that were offered as excited utterances, but even if the Court permitted that it would appear this motion would still be here under the confrontation clause.

But I am interested if there is a case which might not help the State given the Court's ruling, but if there is a case that says that the confrontation clause is satisfied if the person who heard the statement of the out-of-Court declarant, namely the police officer, is availably cross-examined about that.

And that might be of assistance because it would [116] certainly bring into clear focus the effect of the Court's ruling in not permitting the officer to testify about statements that he heard and it may be that – and as I say at the moment I would not anticipate changing my ruling.

But I think that that authority would be helpful for the Court in understanding and I don't know whether it would be of any assistance to the State under the present posture.

Thinking aloud, it may be from the standpoint of the confrontation clause if the Court had been satisfied that the statements to the officer qualify as excited utterances it may have been that the appropriate ruling would have been to exclude the 911 tape as violative of the confrontation clause, but permit the statements to the officer under the theory, if there is a case that says this, that the officer is available for cross-examination as the hearer of these out-of-Court statements.

Ross itself suggests that the focus is on the declarant not someone else, namely Ms. McCottry, and that the

declarant must either be produced or be proven to be unavailable.

MS. GAINES: And your Honor, I have information that I can tell the Court about that right now. That's exactly the Davis case, and that's what I was explaining to the Court earlier that under Davis and the cases that follow thereafter – and Davis is a 2000 case. The Ross case is a 1986 case.

[117] It specifically says that the confrontation clause has been satisfied when the person who heard the statements of the delcarant, meaning in this situation Ms. McCottry, is present for the defendant to cross-examine. And that's exactly what we have here.

THE COURT: Well, what's the cite to Davis again?

MS. GAINES: It's 141 Washington Second, 798, and it's a 2000 case.

THE COURT: And what you're saying is that Davis says that the confrontation clause is satisfied when the officer who heard the excited utterance is available to testify?

MS. GAINES: Exactly.

THE COURT: But with the Court's ruling then without – well, then the question is when all we have is the 911 tape is the defense correct?

MS. GAINES: And that –

THE COURT: And therefore the only relief would be for the Court to reconsider its ruling, which I'm not inclined to do.

MS. GAINES: And, your Honor, that's something that once again I'll need to actually evaluate. And once again to sort of address your question of the willfulness, and I understand at issue here is the 911 tape, which I understand the Court is going to take until the morning to research.

The willfulness is once again cured by the statement [118] on the 911 tape. Ms. McCottry specifically says, I told him not to come here. We also know that according to her statement on the 911 tape he was present. We know that there's a no contact order telling him he's not to have contact.

THE COURT: I'm less concerned about that issue, but I was just acknowledging that it was a thought I had. I think the more serious issue is the confrontation clause, and I certainly would appreciate candid advice.

I just thought it was fair to both Counsel to have the opportunity to reflect upon this and look at Davis, look at Ross, look at anything else that there is.

And certainly I do not feel as 1 sit here now that even if I were to understand that my ruling basically left the State with nowhere to go because of the confrontation issue without indicating that I would likely change my mind obviously it may be the State has to say that's our only redress at this point.

I have a responsibility to make sure there's been a fair trial to both sides in this case. I don't think that I will change my mind on that, but I think intellectually it would be good for the record to indicate what the situation is and whether there's a dispute or not.

It may be that the State will concede that if all they have is the 911 tape the defense motion is proper because of the confrontation clause issue. That's where we are, I believe. [119] All right, we'll see you in the morning. Are Counsel available at 8:30 or are you both somewhere else?

* * *

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON, Plaintiff, vs. ADRIAN DAVIS, Defendant.	)	No. 01-1-02794-4 KNT COA No. 49679-4

PROCEEDINGS BEFORE
THE HONORABLE JAY V. WHITE

September 5, 2001
Kent, Washington

NICOLE GAINES, ATTORNEY FOR THE PLAINTIFF

MARY ELLEN RAMEY, ATTORNEY
FOR THE DEFENDANT

SEATTLE, WASHINGTON; WEDNESDAY,
SEPTEMBER 5, 2001

8:47 a.m.

-o0o-

[2] PROCEEDINGS

THE COURT: I will just indicate briefly that I did do some work on the issue that we were discussing toward the end of yesterday, and it does appear that there's been some significant development in the law since State versus Ross and the Court of Appeals decision was decided.

Probably the most orderly way for me to proceed is to allow Counsel the opportunity to have a few minutes to supplement their argument of yesterday and then I anticipate being able to make a ruling on the motion to dismiss.

Since it's Ms. Ramey's motion, what did you want to add to the record as far as this motion?

MS. RAMEY: Your Honor, I too did some research. I reviewed the Ross case and obviously the Ross case discusses the confrontation clause and gives the criteria and also points us to the Ohio versus Roberts US Supreme Court case.

I think that the Ohio versus Roberts case talks about why the confrontation clause is so important, but I think what we have to look at in the Ohio versus Roberts case is what evidence was admitted in.

In that jurisdiction they have what is called a preliminary hearing process similar to the one that I was [3] accustomed to when I was a prosecutor in Cook County, Illinois.

We would have a person come up in the preliminary hearing court and give a brief summary, enough to establish probably [sic] cause, and the defense attorney at that point would be allowed to cross-examine the witness.

In our situation we have only a 911 tape. Obviously there is no opportunity to cross-examine the person that's complaining. As far as the Davis case, which is supposedly the update from the Ross case, I think that that, even though it addresses the confrontation clause, would not be applicable in this case because in that case it was a capital murder case.

There was lots of other evidence. This was the woman that was drowned in the bathtub. There was forensic evidence. There was shoe print evidence. There was admissions by the defendant after the fact all of which were significant evidence. And then this supposedly excited utterance by a co-defendant was allowed in.

I think that in this case we have to look at what's before the Court. All we have is a 911 tape and officers going to the scene testifying to their observations.

Mr. Davis has the constitutional right to have the testimony of this witness tested. One of the criteria for allowing this in without confrontation is for the State to demonstrate the unavailability of the witness.

In this case – I'm not sure if it was the Ross case [4] or the Roberts case there was a material witness warrant issued for the person to come to Court.

It's expected that when somebody initiates a 911 call that they're going to follow through. And if they choose not to follow through voluntarily, and the State agrees with that position of them not following through for whatever reason then the State just doesn't have a case.

And we have to look at everything in this case to determine whether or not my client's constitutional rights would be violated if this case were allowed to go to a jury.

I don't think a jury would convict based on the evidence that's before the Court however I can never say "never" because I've been in this business too long, and I know that juries never fail to surprise me as to what they will and will not convict on.

So I am very nervous about this case going to the jury. My client faces substantial loss of liberty including a trip to the penitentiary if he's convicted.

And I think that the Court needs to fully examine what's before it and make a determination that the confrontation clause is violated if this case is allowed to go to the jury as is.

THE COURT: Thank you. Ms. Gaines?

MS. GAINES: Your Honor, I too did research last night and reviewed quite a few cases. And I would point the [5] Court's attention to the fact that there are cases out there that say that the confrontation clause is not violated if the information that is allowed into the record falls under the excited utterance rule, which is what we have here.

With that said I also would like to point out to the Court that the Court's concern about the Ross decision and whether or not we have to either produce the victim or prove that she was unavailable.

With that said I'd just like to draw the Court's attention to what we have repeatedly said on this record, and that is one that Ms. McCottry has chosen to absent herself from these proceedings. She received a subpoena. My detective –

THE COURT: She, pardon?

MS. GAINES: She did receive a subpoena. She was subpoenaed to come to Court. She knew about the Court date. I had contact with her up until Thursday of last week.

In fact the last day I spoke with her was on the eve of August 29th, I believe, maybe the 28th. I correct that, the 28th, I believe, either the 28th or the 29th.

At that time she had anticipated coming and had told me that she would be present for Court, but she failed to appear, and I brought to the Court's attention it appears that she somehow was persuaded to absent herself from these proceedings.

We still haven't been able to confirm or deny that [6] because she had literally absented herself from these proceedings. I have with me Detective Gene Murray who is here who can further supplement the record about the efforts the State has made to locate Ms. McCottry.

We have tried to contact her though a reverse directory, but her phone number does not produce an address. We went out to her last known location, and the person who was living there indicated they did not know of her, did not know where she had moved.

I have spoken to our victim advocate, and she doesn't have an address for Ms. McCottry. We know this woman is around. We have checked with the Department of Licensing records, and there is not address for her.

We know this woman is around. We have no idea where this woman is located. She is now refusing to return anyone's phone calls. We have no way of getting in touch with this woman.

And with that said, yes, we've chosen not to issue a material witness warrant, but even if we issued the material witness warrant we have to know where she is to pick her up. We don't know where she is.

We know that she's in this area, but we have no ability to locate her, and have done everything within the State's control to locate her and have not been able to.

Detective Gene Murray is here if the Court has any [7] questions of him as to what steps he has taken to try and locate her. I'm giving you an offer of proof of the things that I know he's done and if the Court would like to inquire he is present to do so.

So she is not available under the rules of evidence and the State has exercised diligence in trying to obtain her presence here.

And for that reason its the State's position that under the case law, the old case law as well as the recent case law, that the defendant's due process rights of confrontation have not been violated.

THE COURT: Thank you. Any reply, Ms. Ramey? It's not required. I just want to extend that to you.

MS. RAMEY: No, your Honor. I think the Court knows our position.

THE COURT: All right. There are a number of decisions that have been made by both the Court of Appeals and the Supreme Court since the Division 1 opinion in State versus Ross at 42 Washington App 806, which is a 1986 decision.

Perhaps the most significant development in terms of the language in Ross that appears to require the State to show, along the lines that Ms. Gaines has offered to do, that the witness is legally unavailable, that due diligence has been applied to locate her, that she simply cannot or reasonably be made to appear.

[8]That language seems to be superseded by a number of cases, State versus Polomo at 113 Washington 2nd 789, a 1989 decision written by Justice Smith. This is the same justice who wrote Davis.

Stated at the beginning of that particular opinion that, "The significant question is whether testimony of a witness relating an out-of-Court statement by a person not present in Court under the excited utterance exception requires proof of unavailability of the declarant."

And right at the beginning of the opinion the Court states that, "The simple answer to the question is that the traditional excited utterance exception to the hearsay rule sufficiently meets the test of reliability to overcome the constitutional confrontation objection."

And that case did not involve a 911 tape, but it did involve statements witnessed by the arresting officer immediately upon coming on the scene of an attempted rape actually in progress.

The Court specifically indicated at the end that they had referred to an unpublished decision of the Court of Appeals, Division 1, which probably was following the Ross rule.

And it was the opinion in Polomo itself. The original Court of Appeals opinion in Polomo said that, "The admission of the out-of-Court hearsay statement without showing a good faith effort to produce the witness violated the petitioner's right to [9] confrontation."

The Supreme Court decision specifically rejects that holding. They then go on to say that the Court of Appeals concluded the error was harmless under the overwhelming tainted evidence test and affirmed the conviction.

We don't have that in this case as an alternate ground. I think it's clear as the defense points out that the 911 tape and the testimony of the officer is really all that's before the jury.

There is not other evidence that if we assume for the sake of the argument, "untainted evidence," that would result overwhelmingly in a finding of guilt.

The Supreme Court remarks at the end that at the end they do agree that there could be – they say, even assuming that there's a violation of the defendant's right to confrontation under the circumstances of Polomo, they said it would be excusable as harmless error, but then again specifically says, "We affirm the Court of Appeals, but not on the ground of harmless error.

"The Sixth Amendment does not require a showing of unavailability of the declarant for admission of an out-of-Court statement under the excited utterance exception of the hearsay rule."

The theory is that this is a so-called "firmly rooted exception," that it has strong indicia of liability. In the [10] same opinion, Polomo, makes the comment that one of the theories of allowing the evidence rule – the excited utterance to satisfy –

The reason for the ruling that the admission of excited utterance does not violate a defendant's right to confrontation of witnesses is the Court also comments, "The theory of the exception itself, mainly hearsay excited utterance, which vouches for its reliability is that the stress of the events suppresses the reflective faculties of the declarant with the result that the utterances are sincere and spontaneous."

They actually go on to say, "The out-of-Court declaration is considered even more reliable than what is likely to be elicited from the same person testifying under oath in Court."

Other cases to the same effect, State versus Davis has similar language and comments, page 846, "A hearsay statement that qualifies for admission under a firmly rooted hearsay exception is so trustworthy that adversarial testing can be expected to add little to its reliability."

State versus Ackerman, which is a Court of Appeals decision from Division 3 at 90 Washington App 477, 1998 includes this discussion, "As originally interpreted the federal confrontation clause required the State to either produce the declarant or show that the declarant was unavailable as a [11] witness. Once a witness was shown to be unavailable the State also had to show the witness' statements bore adequate indicia of reliability to be admissible."

But in White versus Illinois 502 US 346, which is a 1992 decision, the Supreme Court held that a declarant's hearsay statement may be admissible even if the declarant is available as a witness but does not testify as long as the statement's reliability is demonstrated.

"When the proffered testimony has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule or is supported by a showing of particularized guarantees of trustworthiness the confrontation clause is satisfied."

Teglund also has an essay – he's the one who started us down this trail by causing the Court to look at State

versus Ross in the first place, which Teglund cites just for the proposition of what constitutes an excited utterance.

I went over and picked it up off the shelf and found all this discussion about the confrontation clause, which I think has clearly been – I did not jeopardize Ross, and I don't know if Counsel did, no one appears to.

I don't know if they ever specifically distinguish or overrule or reject Ross? It may be sitting there, but it makes no sense in light of Polomo.

MS. GAINES: I did, your Honor, I did actually [12] jeopardize Ross, and that was the problem I ran into. I did find Polomo and the other cases that you mentioned, but none of them, as the Court has noted, specifically say that they overrule Ross. You have to come to that legally in reading the other cases.

THE COURT: The closest thing is Polomo itself, which refers to an unpublished opinion in the Court of Appeals in Division 1 where one could speculate, probably with a fair degree of educated guess, that the reason that the Court of Appeals did not publish the opinion is they thought it was self evident after their decision in Ross.

The Supreme Court specifically refers to that and says no. Ohio versus Roberts is distinguished – it may be in Polomo or one of the others.

Ohio versus Roberts involved a specific Ohio statute that required a showing of unavailability of a witness and it also dealt with prior testimony, not an admission of prior testimony as Ms. Ramey is indicating apparently for a preliminary hearing.

It was not related to an excited utterance, which is under the deeply rooted exception language that the Court's have now approved repeatedly.

And there is actually a similar rule, evidence rule 804, and the various discussions in 804 all require a showing of unavailability.

[13] And what I was getting to to conclude this – and Teglund includes an essay also about the confrontation cl ause starting at page 415 of the 2001 edition. It talks about White versus Illinois and complains that the Courts, as he puts it, "Have simply been working their way through the list of hearsay exceptions deciding on a one-at-a-time basis whether the traditional requirement of unavailability continues to apply.

"The Courts including the United States Supreme Court in White versus Illinois have offered little guidance for the determining whether the requirement of unavailability should apply under other hearsay exceptions, exceptions which have not yet been addressed by the appellate courts."

But he goes on and says, "Predictions are always hazardous, but the trend seems to be toward the view that as far as unavailability is concerned the Sixth Amendment requires no more than the codified exceptions to the hearsay rules thus a finding of unavailability is required only when a finding of unavailability is likewise required under the applicable hearsay exception.

"In practical terms if the prosecution is relying upon one of the hearsay exceptions in Rule 804, which require finding of unavailability the necessary finding of unavailability likewise satisfies the Sixth Amendment.

"By contrast if the prosecution is relying upon one of the hearsay exceptions in Rule 803," which is what is involved [14] in our case, "which apply regardless of the declarant's availability no finding of unavailability is required by the Sixth Amendment."

So it appears that it's now pretty well settled in this state particularly in Polomo, which I don't think could be any more explicit, that because the statement in this case does involve an excited utterance admitted by the Court, the 911 tape, that the defendant's constitutional right to confrontation of witnesses under both the federal and state constitutions is not violated.

Under those circumstances the Court will deny the defense motion to dismiss.

* * *

[40] All right. Thank you. Ladies and gentlemen, at this time please turn your attention to Nicole Gaines who will deliver closing argument on behalf of the State of Washington. Ms. Gaines?

MS. GAINES: Thank you, your Honor. When we finally started this trial yesterday I told you that this was a case about the defendant breaking the law.

You have heard two people talk about how that occurred. Now it is your turn to put those two witnesses and Ms. McCottry's taped statement to the test and put all of this together.

I would like to take this opportunity to work with you through those jury instructions very briefly and help explain why Adrian Davis is guilty of the crime of violation of a Court order.

The Court has read to you the "to convict" instruction, and he's explained to you what I have to show in order for you to convict Mr. Davis of violation of a Court order. Several of these things are not really in dispute.

First of all, the fact that this occurred in King [41] County is not an issue because the officer testified that he did respond to the address that was in Kent, Washington, which is in King County, and that the assault, according to Ms. McCottry, occurred at her home, which is in King County.

The other thing is the date of February 1st. Both officers testified that it was February 1st that they arrived at Ms. McCottry's home.

So let's talk about the defendant willfully having contact with Ms. McCottry. Let's break this up and first talk about the defendant, Adrian Davis. How do we know that it was Adrian Davis that was there that day?

First of all, we have a 911 tape with Ms. McCottry that is made at 11:56 a.m. On the tape you hear her voice. She's scared. She's frightened. She's crying. She identifies herself. She identifies Mr. Davis.

She even gives Mr. Davis' birth date, and that birth date is the same date of birth that is on this no contact order, and you will have an opportunity to take this back to the jury room with you to review. It is also on the Department of Licensing photo.

This is the same man identified in Court by the officer. That is how we place Mr. Davis at the crime and know that it is Mr. Davis, and the same Mr. Davis that is subject to this no contact order.

"Willfully." We know that this crime took place at [42] Ms. McCottry's home. On the 911 tape we hear her say I told him not to come. We know that she said that he was there. He had to get to her home.

He knew that there was a no contact order. How do we know that he knew there was a no contact order? Because that is his signature that is right there, and there is nothing to contest that that is his signature that is on this no contact order.

So he knew that there was a no contact order. He knew he wasn't supposed to be at her home. He still was at her home. That takes care of "willfully."

"Had contact." It is the same thing. He was at her home and an assault occurred on Michelle McCottry. We have Ms. McCottry on the 911 tape identifying herself as Michelle McCottry.

She gives her name. She corrects the operator in the spelling of it. We have a DOL photo and an officer's identification of Ms. McCottry saying that that is her.

Ms. McCottry. Now, granted the photos taken by the officer don't show her face, but the officers spent 30 to 40 minutes with her and they identified this as being the same Michelle McCottry that they spoke to that day. The same Michelle McCottry that they took photographs of her injuries.

"Prohibited by a no contact order." Read this no contact order. Read it closely. You will see that in the print [43] it says that he is to have no contact.

It also says that he is not to assault her, and if he assaults her, meaning Ms. McCottry, then he is subject to

other criminal prosecution. His rules, as prescribed by law, are very clear in this order. He was not to have contact with Michelle McCottry.

The order is dated July 6th, and it doesn't expire until July 6th of 2002. This crime took place on February 1st, well within the time frame for which he was prohibited of having contact with her.

Now, once again he knew the existence of the order. His signature was on that no contact order. So that is the first question you have to answer. Did he have contact? Was it in violation of a valid order? The order was valid. He knew about it. He was there.

The next thing you need to look at is whether or not there was an assault that constituted violation of the no contact order. The Court has read to you the instructions of what is an assault. Let's look at the evidence of the assault, Ms. McCottry's injuries.

Both officers testified that they saw injuries. Officer Tamanaha said in 14 years of his experience he could tell that these injuries were fresh. They were recent. Officer Jones even testified that they were starting to bruise in his presence. They were fresh, and they were recent.

[44] Also the interesting thing about these items being fresh is take a look at this chair and the floor around it. Take a look at the fact that on the chair is the dust from this wall.

Now, although you are bound to follow the Court's instructions you are also allowed to use some common sense. Let's think about this. How long in a house with small children is dust going to stay on a chair? Not long. Children move things. They play around.

That is fresh, and even the officers testified that it appeared fresh and not disturbed. There is also bits of the wall on the floor. Something occurred in this home, and what occurred was that the defendant assaulted Michelle McCottry.

You also need to take into account that the 911 tape started at 11:56. The officers arrived at 12:00 noon. This just occurred. You hear its. McCottry saying he's running down the street. It's a dead end street. He's running down the street. She is describing what is happening at that particular time.

This is not a situation where she waited days, hours or even extensive minutes before reporting. It is not a situation where she didn't report anything. It is right there. This happened, she reported it, it occurred.

Now, in voir dire we talked a lot about why people don't appear in domestic violence cases. We even talked about [45] some of the concerns they have and why they wouldn't want to appear. In this case, yes, Ms. McCottry is not here. And, yes, I am sure all of you would have liked to have heard from her, but this is a domestic violence case.

And domestic violence crimes are not spectator sports. They happen in homes. They happen in the privacy of homes, in private places and generally there are only two people present when these crimes occur, the victim and the defendant.

The other thing you need to consider is that in domestic violence cases, unlike random crimes, there is a relationship between these friends. And it is usually a relationship that is based out of control.

And there is fear that is present, fear to do something, fear to report the person that is the father of your two children because of economic conditions that you may be subject to, because of potential future violence that you think that you could avoid if you don't come forward.

MS. RAMEY: Objection: not based upon the evidence.

THE COURT: The objection is overruled, but it is a good occasion just to remind the jurors that Counsel's statements are argument. They are not evidence. The objection is overruled. You may proceed.

MS. GAINES: You need to consider these things when looking at this. She was not here in person, but she left [46] evidence for you to consider. There are injuries on here. There is a bruise. There is a bruise on the face where the officer indicated it was starting to swell. Her eye was starting to swell.

You have her hysterical on the phone call. You have her in the presence of the officers frantically, fearfully packing her things to leave the area. This young woman left enough evidence for you to convict the defendant and enough things to let you know that she was serious and afraid.

Help her to protect herself. Help her to protect her small children. Help her do the things that she potentially is to fearful to do for herself. Thank you. Find the defendant guilty of violation of a Court order. Thank you.

THE COURT: Ms. Gaines, would you be kind enough to move the easels out of the way. Ladies and gentlemen, I'll give the prosecutor a chance to retrieve her notes. At this time please turn your attention to Mary

Ellen Ramey who will deliver closing argument on behalf of Adrian Davis. Ms. Ramey?

MS. RAMEY: Ladies and gentlemen of the jury, your Honor, Mr. Davis, Ms. Gaines I want to thank you for your attention in this case. Most of the time jurors (inaudible 11:00:44) the waiting in the room while we're doing other things. Well, soon you are going to have the opportunity to do your work in this case.

Let me just say something about the burden of proof in [47] a criminal case. The prosecutor has the burden of proof. In a civil case – some of you may have been on a civil jury – but in a civil case the burden of proof is just the tip of a scale, 51 percent if you will.

In a criminal case the proof required is proof beyond a reasonable doubt, which is a very heavy burden, much, much more than the tip of the scale.

I only get a chance to address you once. After I sit down the prosecutor will have a chance to rebut what I have to say. So if you think of something that you would want to respond to her speak for me when you get in the back when you start your deliberation.

And the reason for this rule is that we have to end sometime so that is the logical way to end after the rebuttal argument.

During the voir dire examination I asked you several things at the end of my second round. And the things that I asked you was that anybody that would not hold the prosecution to the burden of proof in this case and nobody raised their hand.

I asked that there would be anybody who would not make up their mind until all the evidence was in that is until you start deliberation. You all agreed that you would keep an open mind.

And I asked if anybody would hold it against my [48] client, Adrian Davis, if he chose not to testify and if he chose not to present any evidence. And you all agreed that you wouldn't hold it against him.

Now, I've been taking some notes. This has been an extremely short case, and I am here to try and give you reasonable doubts. All you need is one reasonable doubt and you can't convict.

I am here to assist you and give you some reasons why you shouldn't convict, why the State has not proved its case beyond a reasonable doubt.

Now, the evidence consists of the 911 tape and the testimony of two Kent Police Officers. First of all, the 911 tape, purportedly Michelle McCottry, is not under oath. If Michelle McCottrey had been here she would have taken the witness stand.

She would have raised her hand and swore to tell the truth, the whole truth and nothing but the truth similar to the oath that you took to find the facts in this case. We are without that extremely important evidence. It is missing.

Now, if she had taken the stand under oath I would be able to cross-examine her. I would be able to ask her about what happened, who was there, when it happened, who did this, what her motives might be, why the relationship with Adrian Davis was over or whether she wanted it to be over, whether there was another man in her life, whether

she was under the [49] influence of any drugs or alcohol at the time?

I would be able to ask her all of these things and you would be able to hear from a live person. We don't have that here. All we have is a 911 tape. You are not able to assess her credibility. Is she telling you the truth? Why did she make this 911 call? Had it ever happened before? None of this is before you.

Now, we have the two police officers that testified. They don't tell you anything about the circumstances of what occurred. Again, that is a blank. What you have is two officers that go in there. They take some photographs and they say well this looks like a fresh bruise on the arm.

This looks like right in my presence I can see the mark on the face changing, the abrasion. They are not doctors. They are just there to make an arrest, and no arrest was made at the scene.

They ask her, Michelle McCottry, move your hand from your face so we can take your picture. She disobeyed. She would not move her hand. Just like she disobeyed the prosecutor and didn't come to Court.

You heard the officers talk about how this place was in a state of disarray. She was running around like a wild woman, and her only motive was to get out of there.

Now, you are going to see the no contact order when you go into the jury room, and nowhere in this no contact order [50] is there anything about Mr. Davis not having contact with his children. The no contact order was between Ms. McCottry and Adrian Davis.

So when you listen to that 911 tape you will hear a child in the background saying "Daddy" after Ms. McCottry was no longer on the phone. Does that indicate to you that he had been on the phone and not there and maybe she anticipated that he might be coming over so she panicked and she called the police. She called 911.

Ladies and gentlemen, there are people that abuse the 911 system. And the picture that you see of the rocker against the wall – there's no way to tell when that happened. There is absolutely no way, and in a house that is in that much of a disarray? Michelle McCottry is apparently was not a good housekeeper.

It is possible that that wall had been there for a long time broken. We have no evidence when that wall was actually broken and when the dust came up. And there is no police officer in the world that can say this is fresh dust.

There is no way to know when the marks got on Ms. McCottry's body. Were they there before? Were they from an old injury? We just don't know.

There is no way to show when the bruising on the arm got there. There is no medical testimony. There is no expert testimony. That could have been there for a long period of [51] time. And there is no way to show when that wall was damaged or how the wall was damaged.

And most importantly there is nobody on that witness stand that can point to Adrian Davis and say that he was there, that he was the one that did all these things that he is accused of doing.

If you listen to the 911 tape you hear a hysterical woman, but notice how she is able to turn it on and turn it

off. She turns it on when she wants to, and she turns it off when she wants to.

Now, I am going to point out a few of these jury instructions that you will have a chance to review. In jury instruction number one on page two kind of in the middle where it says that you are the sole judges of the credibility of the witnesses and the weight to be given to the testimony of each.

It says, "In considering the testimony of the witness you may take into account the opportunity and the ability of the witness to observe, the witness's memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence and any other factors that bear on believability and weight."

Well, I submit to you that all we have is two police officers as witnesses who have not had the opportunity to observe Michelle McCottry. You have not been able to assess her [52] memory and manner while testifying. You have not been able to have any information as to any interest, bias or prejudice that she may have.

And you have no way of assessing whether or not her testimony would be reasonable in light of all of the evidence and any other factors that weigh upon her believability and weight.

On the third page, the second paragraph from the end, it says, "You have nothing to do with any punishment that will that will [sic] be imposed in case of a violation of the law. The fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful."

The instruction number three talks about the State being the plaintiff. They are the ones that instituted this case. They have the burden of proving each and every element beyond a reasonable doubt.

A defendant is presumed innocent. As Mr. Adrian Davis sits at the table in a black sweatshirt he is presumed innocent. And that presumption continues until during your deliberation you have found that it has been overcome by the evidence beyond a reasonable doubt.

And then it goes on the [sic] say, "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully [53] considering all of the evidence or lack of evidence."

And then we have the elements that the prosecutor must prove each element beyond a reasonable doubt that on February 1st, 2001 the defendant willfully had contact with Michelle McCottry.

That that [sic] such contact was prohibited by a no contact order. That the defendant knew of the existence of the no contact order and that the acts occurred in the County of King.

I submit to you that the prosecution has failed to prove the first element that the defendant had any willful contact with Michelle McCottry. It is the prosecution's duty to prove that element beyond a reasonable doubt.

You can't speculate as to what might have happened on February 1st of this year, what could have happened, what possibly happened. That isn't enough. You need to convict based upon proof beyond a reasonable doubt.

The State's case is very weak. It is without merit and is not substantiated by evidence. There is some evidence, but that evidence does not rise to proof beyond a reasonable doubt.

You are here as triers of the facts. Not even Judge White in this case can decide the facts. As we said before you are like many judges. You have to decide whether the evidence you heard, the very little evidence you heard, rises to proof beyond a reasonable doubt.

[54] Tell the prosecution that her case is weak and that there is not enough evidence to convict the defendant, Adrian Davis. I ask you to sign the verdict that Mr. Adrian Davis is not guilty of the charge before you.

THE COURT: Thank you, Ms. Ramey. Ladies and gentlemen of the jury as under our system the party with the burden of proof does get the opportunity to address you again by way of rebuttal arguments so again please turn your attention to Nicole Gaines who will provide rebuttal argument on behalf of the State of Washington. Ms. Gaines?

MS. GAINES: Thank you, your Honor. Ms. Ramey would like you to follow several red herrings in this case. And that is her job to try and persuade you that there is a reasonable doubt there. That is what she does. That is her job, but it is just not there.

I agree, it would be nice to have Ms. McCottry here, but you don't, and what you have are other things that she's done for you to convict the defendant.

Ms. Ramey would like you to believe that no one was there to see this crime; no one that you heard from saw this crime. That is not true. You have the voice of Ms.

McCottry on that 911 tape. She reported it right when it happened.

You need to also consider the fact that the officers saw the bruising on her change in their presence. Old wounds don't change in a matter of minutes, new wounds do.

[55] That is a common sense thing. Anybody with kids, anybody that has hurt themselves, any experience with wounds whatsoever tells you that is the case.

She also pointed to the fact that the children and the no contact order doesn't address the children. It doesn't matter. The children are not the issue here. The issue is that he was not to have contact with Ms. McCottry. He had contact with her. That violated the order.

It doesn't matter whether he was allowed to see his children or not. If those children were with Ms. McCottry it doesn't matter. Her [sic] can't have contact with her at all for any reason whatsoever. The order makes that explicit.

And if you really, truly want to think about this, as you must, just consider that there was a person present and that person is Ms. McCottry and although she is not here today to talk to you she left you something better.

She left you her testimony on the day that this happened, February 1st, 2001, this shows that the defendant, Adrian Davis was at her home and assaulted her. It is right here in her voice.

* * *

911 RECORDING IS PLAYED FOR THE JURY

* * *

MS. GAINES: On February 1st, 2001 Adrian Davis was in the home of Michelle McCottry and hit her in front of [56] their small children. He left injuries on her face. That was in direct violation of a Court order. He assaulted her. And now I am asking you to find him guilty for such. Thank you.

THE COURT: Thank you, Ms. Gaines.

* * *

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, Vs. ADRIAN M DAVIS Defendant.	No. 01-1-02794-4 KNT **JUDGMENT AND SENTENCE FELONY** (Filed Dec. 17, 2001)

I. HEARING

I.1 The defendant, the defendant's lawyer, MARY ELLEN RAMEY, and the deputy prosecuting attorney were present at the sentencing hearing conducted today. Others present were: _____

_____

II. FINDINGS

There being no reason why judgment should not be pronounced, the court **finds**:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 09/06/2001 by jury verdict of:

Count No.: 1 Crime: Felony Violation of a Court Order – DV
RCW 26.50.110(1) Crime Code: 06013
Date of Crime: 02/01/2001 Incident No. _____

Count No.: __ Crime: _____
RCW _____ Crime Code: _____
Date of Crime: _____ Incident No. _____

Count No.: __ Crime: _____
RCW _____ Crime Code: _____
Date of Crime: _____ Incident No. _____

Count No.: __ Crime: _____
RCW _____ Crime Code: _____
Date of Crime: _____ Incident No. _____

[ ] Additional current offenses are attached in **Appendix A**

SPECIAL VERDICT or FINDING(S):

(a) [ ] While armed with a **firearm** in count(s) ___ RCW 9.94A.310(3).

(b) [ ] While armed with a **deadly weapon** other than a firearm in count(s) ___ RCW 9.94A.310(4)

(c) [ ] With a **sexual motivation** in count(s) ___ RCW 9.94A.127.

(d) [ ] A V.U.C.S.A offense committed in a **protected zone** in count(s) ___ RCW 69.50.4355.

(e) [ ] **Vehicular homicide** [ ] Violent traffic offense [ ] DUI [ ] Reckless [ ] Disregard.

(f) [ ] **Vehicular homicide** by DUI with ___ prior conviction(s) for offense(s) defined in RCW 41.61.5055, RCW 9.94A.310(7).

(g) [ ] **Non-parental kidnapping** or unlawful imprisonment with a minor victim. RCW 9A.44.130.

(h) [X] **Domestic violence** offense as defined in RCW 10.99.020 for count(s) I_____

(i) [ ] Current offenses **encompassing the same criminal conduct** in this cause are count(s) _____ RCW 9.94A.400(1)(a)

2.2 OTHER CURRENT CONVICTION(S): Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): ____

_____

2.3 CRIMINAL HISTORY: Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.360):

[X] Criminal history is attached in **Appendix B**.

[ ] Prior convictions counted as one offense in determining the offender score (RCW 9.94A.360(5) are: _____

[ ] One point added for offense(s) committed while under community placement for count(s) _____

2.4 SENTENCING DATA:

Sentencing Data	Offender Score	Seriousness Level	Standard Range
Count 1	3	V	
Count			
Count			
Count			

Enhancement	Total Standard Range	Maximum Term
	15 to 20 Months	5 Yrs And/Or $10,000

[ ] Additional current offense sentencing data is attached in **Appendix C**.

2.5 EXCEPTIONAL SENTENCE:

[ ] Substantial and compelling reasons exist which justify a sentence above/below the standard range for Count(s) _____. Findings of Fact and Conclusions of Law are attached in **Appendix D**. The State [ ] did [ ] did not recommend a similar sentence.

III. JUDGMENT

IT IS ADJUDGED that defendant is guilty of the current offenses set forth in Section 2.1 above and **Appendix A**.

[ ] The Court DISMISSES Count(s) _____.

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the other terms set forth below.

4.1 RESTITUTION AND VICTIM ASSESSMENT:

[ ] Defendant shall pay restitution to the Clerk of this Court as set forth in attached **Appendix E**.

[ ] Defendant shall not pay restitution because the Court finds that extraordinary circumstances exist, and the court, pursuant to RCW 9.94A.142(2), sets forth those circumstances in attached Appendix E.

[X] Restitution to be determined at future restitution hearing on (Date) _____ at _____m.

[X] Date to be set.

[X] Defendant waives presence at future restitution hearing(s).

[ ] Restitution is not ordered.

Defendant shall pay Victim Penalty Assessment pursuant to RCW 7.68.035 in the amount of $500.

4.2 OTHER FINANCIAL OBLIGATIONS: Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed. The Court waives financial obligation(s) that are checked below because the defendant lacks the present and future ability

to pay them. Defendant shall pay the following to the Clerk of this Court:

(a) [ ] $___, Court costs; [ ] Court costs are waived; (RCW 9.94A.030, 10.01.160)

(b) [ ] $___, Recoupment for attorney's fees to King County Public Defense Programs; [ ] Recoupment is waived (RCW) 9.94A.030);

(c) [ ] $___, Fine; [ ] $1,000, Fine for VUCSA; [ ] $2,000, Fine for subsequent VUCSA; [ ] VUCSA fine waived (RCW 69.50.430);

(d) [ ] $___, King County Interlocal Drug Fund; [ ] Drug Fund payment is waived; (RCW 9.94A.030)

(e) [ ] $___, State Crime Laboratory Fee; [ ] Laboratory fee waived (RCW 43.43.690);

(f) [ ] $___, Incarceration costs; [ ] Incarceration costs waived (RCW 9.94A.145(2));

(g) [ ] $___, Other costs for:_____

4.3 PAYMENT SCHEDULE: Defendant's TOTAL FINANCIAL OBLIGATION is $500.00 + restitution. The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms: [ ] Not less than $___ per month; [X] On a schedule established by the defendant's Community Corrections Officer. Financial obligations shall bear interest pursuant to RCW 10.82.090. **The Defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for up to ten years from the date of sentence or release from confinement to assure payment of financial obligations.**

4.4 CONFINEMENT OVER ONE YEAR: Defendant is sentenced to a term of total confinement in the

custody of the **Department of Corrections** as follows, commencing: [X] immediately; [ ] (Date): _____ by ___.m. I

15 months/days on count I ; ___ months/days on count ___; ___ months/day on count ___

___ months/days on count ___; ___ months/days on count ___; ___ months/day on count ___

The above terms for counts _____ are concurrent/consecutive.

The above terms shall run concurrent/consecutive with cause No.(s) _____

_____

The above terms shall run consecutive to any previously imposed sentence not referred to in this order.

[ ] In addition to the above term(s) the court imposes the following mandatory terms of confinement for any special **WEAPON** finding(s) in section 2.1: _____

_____

which term(s) shall run consecutive with each other and with all base term(s) above and terms in any other cause. (Use this section only for crimes committed after 6-10-98)

[ ] The enhancement term(s) for any special **WEAPON** findings in section 2.1 is/are included within the term(s) imposed above. (Use this section when appropriate, but for crimes before 6-11-98 only, per In Re Charles)

The **TOTAL** of all terms imposed in this cause is _____ months.

Credit is given for [X] 221 days served [ ] days as determined by the King County Jail, solely

for conviction under this cause number pursuant to RCW 9.94A120(17).

4.5 NO CONTACT: For the maximum term of 5 years, defendant shall have no contact with Michelle McCottry except during the period in which the defendant is in custody. [/s/JW]

4.6 Blood Testing: (sex offense, violent offense, prostitution offense, drug offense associated with the use of hypodermic needles) **Appendix G** is a blood testing and counseling order that is part of and incorporated by reference into this Judgement and Sentence.

4.7 (a) [ ] **COMMUNITY PLACEMENT** pursuant to RCW 9.94A.120(9), for **qualifying crimes committed before 7-1-2000**, is ordered for ___ months or for the period of earned early release awarded pursuant to RCW 9.94A.150 whichever is longer. [24 months for any serious violent offense, vehicular homicide, vehicular assault, or sex offense prior to 7-6-96; 12 months for any assault 2°, assault of a child 2°, felony violation of RCW 69.50/52, any crime against person defined in RCW 9.94A.440 not otherwise described above.] **Appendix H** for Community Placement conditions is attached and incorporated herein.

(b) [ ] **COMMUNITY CUSTODY** pursuant to RCW 9.94.120(10) for any **SEX OFFENSE committed after 6-6-96 but before 7-1-2000**, is ordered for a period of 36 months or for the period of earned early release awarded under RCW 9.94A.150 whichever is longer. **Appendix H** for Community Custody Conditions and **Appendix J** for sex offenders registration is attached and incorporated herein.

(c) [X] **COMMUNITY CUSTODY** – pursuant to RCW 9.94A.120(11) **for qualifying crimes**

committed after 6-30-2000 is ordered for the following established range:

[ ] Sex Offense, RCW 9.94A.030(36) – 36 to 48 months

[ ] Serious Violent Offense, RCW 9.94A.030(34) – 24 to 48 months

[ ] Violent Offense, RCW 9.94A.030(41) – 18 to 36 months

[X] Crime Against Person, RCW 9.94A.440 – 9 to 18 months

[ ] Felony Violation of RCW 69.50/52 – 9 to 12 months

or for the entire period of earned early release awarded under RCW 9.94A.150, whichever is longer. Sanctions and punishments for non-compliance will be imposed by the Department of Corrections pursuant to RCW 9.94A.205.

[X] APPENDIX H for Community Custody conditions is attached and incorporated herein.

[ ] APPENDIX J for sex offender registration is attached and incorporated herein.

4.8 **[X] WORK ETHIC CAMP:** The court finds that the defendant is eligible for work ethic camp, is likely to qualify under RCW 9.94A.137 and recommends that the defendant serve the sentence at a work ethic camp. Upon successful completion of this program, the defendant shall be released to community custody for any remaining time of total confinement. The defendant shall comply with all mandatory statutory requirements of community custody set forth in RCW 9.94A.120(9)(b). **Appendix H** for Community Custody Conditions is attached and incorporated herein.

4.9 **[ ] ARMED CRIME COMPLIANCE, RCW 9.94A.103,105.** The State's plea/sentencing agreement is [ ] attached [ ] as follows:

_____

_____

Date: 12-14-01 /s/ Jay White
JUDGE

Print Name JAY V. WHITE

Presented by:

/s/ Nicole A. Gaines #26127
Deputy Prosecuting Attorney, WSBA #

Print Name: Nicole A. Gaines

Approved as to form:

/s/ Mary Ellen Ramey 10705-
Attorney for Defendant, WSBA #

Print Name: Mary Ellen Ramey

FINGERPRINTS

[Fingerprints Omitted In Printing]

Right Hand

Fingerprints Of:

ADRIAN MARTEL DAVIS

Defendant's Signature
/s/ Adrian M. Davis

Defendant's Address: 2320 Benson Road #I202 Renton WA

Dated: 12-14-01

Attested By: Paul L. Sherfey,
Superior Court Clerk

/s/ Jay V. White
Judge, King County Superior Court

By: /s/ [Illegible]
Deputy Clerk

JAY V. WHITE

Certificate

I, _____, Clerk Of This Court, Certify That The Above Is A True Copy Of The Judgement And Sentence In This Action On Record In My Office.

Offender Identification

S.I.D. No. WA18455423
DOB: August 13, 1965
SEX: M
RACE: B

Clerk

By: _____
Deputy Clerk

APPENDIX B

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. ADRIAN M DAVIS Defendant,	No. 01-1-02794-4 KNT JUDGMENT AND SENTENCE, (FELONY) – APPENDIX B, CRIMINAL HISTORY

2.2 The defendant has the following criminal history used in calculating the offender score (RCW 9.94A.360):

Crime	Sentencing Date	Adult or Juv. Crime	Cause Number	Location
Theft 2	06/10/92	ADULT	90304594U 1013	MN
~~Burg 3~~ [/s/ NG]	~~06/09/92~~	~~ADULT~~	~~91325878D 3764~~	~~MN~~
Aggravated Robbery	10/20/93	ADULT	9392368R1 123	MN
VUCSA	03/12/01	ADULT	011005774	KING

[ ] The following prior convictions were counted as one offense in determining the offender score (RCW 9.94A.360(11)):

Date: 12-14-01 /s/ Jay V. White
Judge, King County Superior Court
JAY V WHITE

APPENDIX H

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. ADRIAN M DAVIS Defendant,	No. 01-1-02794-4 KNT JUDGMENT AND SENTENCE, APPENDIX H, COMMUNITY PLACEMENT/COMMUNITY CUSTODY

The Defendant shall comply with the following conditions of community placement or community custody pursuant to RCW 9.94A.120(9)(b); RCW 9.94A.120(10); RCW 9.94A.120(11); or RCW 9.94A.137 for Work Ethic Camp approved offenders:

Report to and be available for contact with the assigned community corrections officer as directed:

2) Work at Department of Corrections – approved education, employment, and/or community service;
3) Not possess or consume controlled substances except pursuant to lawfully issued prescriptions;
4) Pay supervision fees as determined by the Department of Corrections;
5) Receive prior approval for living arrangements and residence location; and

6) Not own, use, or possess a firearm or ammunition. (RCW 9.94A.120(16)
7) Notify community corrections officer of any change in address or employment;
8) Remain within geographic boundary, as set forth in writing by the Department of Corrections Officer or as set forth with SODA order.

OTHER SPECIAL CONDITIONS:

[ ] The defendant shall not consume any alcohol
[X] Defendant shall have no contact with: Michele McCottry except while the defendant is in custody
[ ] Defendant shall remain [ ] within [ ] outside of a specified geographical boundary, to wit: _____
[X] The defendant shall participate in the following crime-related treatment or counseling services: Domestic violence batterer's treatment with a state certified agency
[ ] The defendant shall comply with the following crime-related prohibitions: _____
[ ] _____
[ ] _____
[ ] _____

Other conditions may be imposed by the court or Department during community custody.

Community Placement or Community Custody shall begin upon completion of the term(s) of confinement imposed herein or when the defendant is transferred to Community Custody in lieu of earned early release. The defendant shall remain under the supervision of the Department of corrections and follow explicitly the instructions and conditions established by that agency. The Department may require the defendant to perform affirmative acts deemed appropriate to monitor compliance with the

conditions [RCW 9.894A.120(15)] and may issue warrants and/or detain defendants who violate a condition [RCW 9.94A.207]

Date: 12-14-01 /s/ Jay V. White
JUDGE

JAY V. WHITE

116 Wash.App. 81, 64 P.3d 661

Court of Appeals of Washington,
Division 1.
STATE of Washington, Respondent,
v.
Adrian Martell DAVIS, Appellant.
No. 49679-4-I.

March 10, 2003.

AGID, J.

Adrian Davis was convicted of felony violation of a no-contact order. He appeals his conviction on three grounds: He argues the trial court (1) deprived him of his right to confrontation by admitting a 911 tape that was unreliable hearsay; (2) failed to give the jury a missing witness instruction when the victim failed to appear for trial; and (3) failed to give a complete to convict instruction because the felony violation of a no-contact order "assault" element was included in the special verdict form but not in the to convict instruction. We affirm.

FACTS

On February 1, 2001, a 911 dispatcher received a hang-up call from Michelle McCottry's residence in Kent. The 911 dispatcher called back and talked to McCottry who was upset and crying. She stated, "He's here jumping on me again." In response to the 911 operator's questions, McCottry said Davis ran out the door after hitting her with his fists, she had a protection order against him that prohibited him from seeing her, and because she was moving, Davis came to pick up some of his things. McCottry was arguing with a visitor when Davis arrived. Davis joined the argument, and McCottry stated that he

"jump[ed] up and start[ed] beating [her] up." McCottry identified herself and Davis during the call.

Officers Mark Jones and Steve Tamanaha responded to the scene. When they arrived, McCottry was visibly upset and crying. Officer Jones noticed that the house was in a state of disarray and there was damage to one of the walls. McCottry had fresh injuries on her forearm and face that were beginning to swell. While she spoke with the officers, she was frantically moving around the house and packing her family's belongings. When Officer Tamanaha photographed McCottry's injuries, she tried to cover her face. The officers later confirmed there was a protection order against Davis and cited him for violating a no-contact order. Davis was convicted of felony violation of a no-contact order and sentenced within the standard range. He filed a timely appeal.

ANALYSIS

I. Admission of the 911 Tape

In all criminal prosecutions, a defendant has a right to confront his accusers to ensure the reliability of evidence against him.[1] However, admission of a hearsay statement does not violate an accused's confrontation right if it bears adequate "indicia of reliability."[2] Reliability may be inferred when the statement either (1) falls within a firmly-rooted hearsay exception or (2) contains particularized

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[1] U.S. Const. amend. VI; Wash. Const. art I, § 22; *Maryland v. Craig*, 497 U.S. 836, 845, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990).

[2] *State v. Davis*, 141 Wash.2d 798, 10 P.3d 977 (2000).

guarantees of trustworthiness.[3] We review the trial court's decision that a statement is an excited utterance under the abuse of discretion standard.[4]

Davis argues that although the trial court admitted the 911 tape as an excited utterance, it does not properly satisfy Confrontation Clause concerns because it is unreliable. The State asserts that the 911 tape testimony falls within a firmly-rooted hearsay exception and therefore is inherently reliable. We agree with the State because (1) McCottry's statements were properly characterized as excited utterances and (2) excited utterances are firmly-rooted exceptions to the hearsay rule which meet the reliability test the Supreme Court adopted in *Ohio v. Roberts*.[5]

The excited utterance exception assumes that a reaction to the stress of a startling event offers little or no opportunity for a statement that is a misrepresentation or conscious fabrication.[6] A statement is an excited utterance under ER 803(a)(2) if it relates to a startling event or condition and is made while the declarant was under the stress or excitement caused by the event or condition.[7] In this case, when McCottry answered the 911 call-back there was yelling in the background and she sounded frantic as she responded to the operator's questions about what was happening. When McCottry identified Davis and told the

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[3] *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).

[4] *State v. Strauss*, 119 Wash.2d 401, 417, 832 P.2d 78 (1992).

[5] 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).

[6] *State v. Palomo*, 113 Wash.2d 789, 796-98, 783 P.2d 575 (1989), *cert. denied*, 498 U.S. 826, 111 S.Ct. 80, 112 L.Ed.2d 53 (1990).

[7] *State v. Jackson*, 113 Wash.App. 762, 54 P.3d 739 (2002).

operator he was running from the scene in his car, she abruptly dropped the phone, saying she needed to close the door to the house. The police officers who responded to the scene several minutes after the call corroborated her condition by describing her as "crying" and visibly "upset." Because the statements made on the tape were clearly made during and immediately after a startling event and related to that event, they are properly admitted as excited utterances.

An excited utterance is a firmly-rooted hearsay exception.[8] If a statement falls within a firmly-rooted hearsay exception, adequate indicia of reliability are presumed under *Roberts*.[9] When a hearsay statement satisfies the requirements of *Roberts*, further inquiry into whether the statement is trustworthy is not necessary.[10] We accordingly reject Davis' argument that this court should examine "circumstantial indicators" that the 911 tape is unreliable under the factors set forth in *State v. Ryan*.[11]

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[8] *Davis*, 141 Wash.2d at 846, 10 P.3d 977.

[9] *Id.* at 848 n. 281, 10 P.3d 977 (citing *State v. Whelchel*, 115 Wash.2d 708, 715, 801 P.2d 948 (1990)).

[10] *Id.* at 847, 10 P.3d 977; *see also State v. Smith*, 148 Wash.2d 122, 59 P.3d 74, 79 (2002) (when an out-of-court statement *does not* fall under one of the firmly-rooted hearsay exceptions, the Confrontation Clause requires the proponent of the statement to demonstrate that the declarant is unavailable and that the statement bears adequate indicia of reliability under *State v. Ryan*, 103 Wash.2d 165, 691 P.2d 197 (1984)).

[11] 103 Wash.2d 165, 691 P.2d 197 (1984) (listing nine factors useful in determining whether prior out-of-court statements violate a defendant's right to confrontation).

Davis claims *State v. Brown*[12] and *Lilly v. Virginia*[13] support his argument that an excited utterance can be unreliable. Neither case is persuasive. In *Brown*, the victim told authorities that she was abducted and raped. At the pretrial hearing, the trial court admitted a 911 tape of her telephone conversation with an operator. At trial, the victim testified that she fabricated the statements she made on the 911 tape. The Washington Supreme Court concluded the trial court abused its discretion by admitting the tape as an excited utterance because it was an actual fabrication. There is no evidence of fabrication in this case. In *Lilly*, the U.S. Supreme Court held an accomplice's confession obtained in police custody and admitted under the "statement against penal interest" exception to the hearsay rule was unreliable because of the accomplice's natural motive to attempt to exculpate himself."[14] Statements against penal interest are not among the firmly-rooted exceptions to the hearsay rule.[15] Nor is McCottry an accomplice or coconspirator, and the record reveals no reason for her to lie.[16]

Davis also relies on *State v. Ross*[17] in which this court held that the State violated a defendant's right to confrontation by introducing hearsay statements on a 911 tape when the declarant failed to testify. Although no case has expressly overruled *Ross*, its holding was effectively overruled by the Washington Supreme Court's opinion in

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[12] 127 Wash.2d 749, 903 P.2d 459 (1995).

[13] 527 U.S. 116, 133, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999).

[14] *Lilly*, 527 U.S. at 121-22, 119 S.Ct. 1887.

[15] *Id.* at 134, 119 S.Ct. 1887.

[16] Davis admits that no motive to lie was offered at trial.

[17] 42 Wash.App. 806, 714 P.2d 703 (1986).

State v. Palomo.[18] in *palomo*, THE COURT Rejected "the broad proposition that the confrontation clause bars admissibility of hearsay statements unless unavailability of the declarant is shown."[19] The *Palomo* court held that a statement is properly admitted under the excited utterance exception to the hearsay rule regardless of the declarant's availability at trial.

In sum, we conclude that the trial court properly admitted the 911 tape as an excited utterance, and its admission does not offend Davis' right to confrontation because the statements fall within a firmly-rooted hearsay exception.

II. The Missing Witness Instruction

Davis argues that the trial court erred by failing to give the jury a missing witness instruction when McCottry did not testify at trial. The instruction informs the jury it can infer from the witness' absence at trial that her testimony would have been unfavorable to the party who would logically have called her. The instruction is appropriate when (1) the witness is "peculiarly available" to a party, (2) the witness' testimony relates to an issue of fundamental importance, and (3) circumstances at trial establish that, as a matter of reasonable probability, the party would not fail to call the witness unless her testimony would have been damaging or unfavorable.[20] But no inference is permitted if the witness' absence can be

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[18] 113 Wash.2d 789, 783 P.2d 575 (1989), *cert. denied*, 498 U.S. 826, 111 S.Ct. 80, 112 L.Ed.2d 53 (1990).

[19] *Palomo*, 113 Wash.2d at 794, 783 P.2d 575.

[20] *State v. Davis*, 73 Wash.2d 271, 276-78, 438 P.2d 185 (1968).

satisfactorily explained.[21] We conclude that the trial court properly refused to give the missing witness instruction because McCottry's absence was satisfactorily explained at trial and the record shows that the State used all available means to locate her.

McCottry was unavailable because the State could not locate her even though it reasonably believed she would appear at trial. The State was in contact with McCottry until the day of trial.[22] During that time, she appeared when asked to appear, met with the prosecutor several times, and promptly returned the prosecutor's and victim advocate's phone calls. McCottry told the prosecutor that she would appear at trial, and the State subpoenaed her. When McCottry unexpectedly failed to appear for a defense interview, the prosecutor tried to locate her to no avail. The following day, the victim's advocate got a phone message from McCottry in which she said that Davis had contacted her and threatened that her children would be taken away and she would look like a liar if she came and testified. The prosecutor explained that McCottry and her children were involved in a house fire two weeks before, there were concerns about housing arrangements, and the State did not know where she was living. This was a fully adequate explanation.[23]

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[21] *Id.*

[22] The prosecutor spoke with McCottry by telephone the night before her scheduled appearance.

[23] *See State v. Lopez*, 29 Wash.App. 836, 631 P.2d 420 (1981) (upholding a court's refusal to give a missing witness instruction by concluding that the State satisfactorily explained that the witnesses did not appear after agreeing to testify at trial and the State could not locate them).

Second, the State used all available means to locate McCottry. When she failed to appear for a defense interview, the prosecutor immediately attempted to contact her personally and through the victim's advocate. Both attempted to contact her by telephone, the State sent a detective to her last known address, and the detective attempted to find her address through a reverse phone directory.[24] Despite this, the State could not locate McCottry.

Because the State provided a satisfactory explanation for the witness' absence and used all available means to contact her, the trial court properly refused a missing witness instruction.

III. The To Convict Instruction

Finally, Davis contends he was deprived of due process because the to convict jury instruction for felony violation of a domestic violence no-contact order omitted the statutory "assault" element. The State argues that (1) Davis waived his right to appeal under RAP 2.5(a) by

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[24] Davis argues that the State did not use all available means because it did not obtain a material witness warrant. The State explained to the trial court that because McCottry agreed to testify, it did not obtain one. It did not issue one when McCottry unexpectedly failed to appear because even with the warrant, they had no ability to pick her up without knowing where she was. *See State v. Hobson*, 61 Wash.App. 330, 338, 810 P.2d 70, *review denied*, 117 Wash.2d 1029, 820 P.2d 510 (1991) (noting that "Washington case law is silent on the issue of whether the State must obtain a material witness warrant to hold a witness in custody whenever the State knows such action may be necessary to ensure the witness's presence at trial."). In this case, it would have been futile because the State could not have served the warrant.

failing to object to the instruction below and (2) in any case, the trial court instructed the jury on all of the crime's elements. Failure to instruct the jury on every element of the crime charged is an error of constitutional magnitude that may be raised for the first time on appeal,[25] so we reject the State's first argument. This court reviews a challenged jury instruction de novo.[26] Jury instructions are to be read as a whole, and each one is read in the context of all others given.[27] Instructions are sufficient if they properly inform jurors of the applicable law, are not misleading, and permit each party to argue his or her theory of the case.[28]

At the conclusion of testimony, the trial court instructed the jury on the law. First, the court instructed the jury that in order to find Davis guilty of violation of a no-contact order, each of the following elements must be proved beyond a reasonable doubt

(Instruction 9):

> (1) That on or about February 1, 2001 the defendant willfully had contact with Michelle McCottry;

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[25] *State v. Deryke*, 110 Wash.App. 815, 819, 41 P.3d 12[illegible] (2002) (citing *State v. Aumick*, 126 Wash.2d 422, 429-30, 894 P.2d 1325 (1995)), *review granted*, 148 Wash.2d 1001, 60 P.3d 1211 (2003).

[26] *Id.* (citing *State v. Pirtle*, 127 Wash.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996)).

[27] *Id.* (citing *State v. Brown*, 132 Wash.2d 529, 605, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998)).

[28] *Id.* (citing *State v. Mark*, 94 Wash.2d 520, 526, 618 P.2d 73 (1980)).

> (2) That such contact was prohibited by a no-contact order;
>
> (3) That the defendant knew of the existence of the no-contact order;
>
> (4) That the acts occurred in the County of King.

The court also included an instruction that defined the term "assault" for the jury (instruction 8). And it gave the jury the following instruction on the special verdict form (instruction 12), which read:

> You will also be furnished with a special verdict form. If you find the defendant not guilty of the crime of violation of a no contact order, do not use the special verdict form. If you find the defendant guilty, you will then use the special verdict form and fill in the blanks "yes" or "no" according to the decision you reach. In order to answer the question on the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no."

Finally, the court gave the jury a special verdict form on which it was to indicate whether the State had proven the factor which makes violation of the no-contact order a felony. It read:

> We, the jury, return a special verdict by answering as follows:
>
> Was the conduct that constituted a violation of the no-Contact order an assault?

ANSWER:

_____

(Yes or No)

Davis now argues the to convict instruction for felony violation of a no-contact order was incomplete because the "assault" element was not included. The State asserts there was no error because the court gave instructions 8 and 12 and the accompanying special verdict form, which fully instructed the jury on the factor that elevates the crime to a felony violation of a domestic violence no-contact order. We agree with the State.

As a general rule, the to convict instruction need not specify every element of the charged crime in every case.[29] In *State v. Emmanuel*,[30] the State charged the defendant with bribery, and the court gave a detailed to convict instruction including all but one of the crime's elements. The Washington Supreme Court held this instruction was deficient, reasoning that by undertaking to specifically tell the jury that they could convict the defendant if they found that four elements of the crime had been proven, the judge provided "a yardstick by which the jury were [sic] to measure the evidence in determining appellant's guilt or innocence of the crime charged."[31] The *Emmanuel* court stated that when the instruction purported to include all the elements, the jury was not required to search other instructions to see if another element alleged in the information should have been added.[32] Thus, if the to

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[29] *State v. Emmanuel*, 42 Wash.2d 799, 819, 259 P.2d 845 (1953).

[30] 42 Wash.2d 799, 819, 259 P.2d 845 (1953).

[31] *Id.*

[32] *Id.*

convict instruction acts as a yardstick of the law, it must include a complete summation of that law.[33] Where a trial court has not undertaken to provide a yardstick to the jury, the instructions are to be read as a whole and each instruction is to be read in the context of all the others given.[34]

The State relies on *State v. Oster*.[35] There the defendant was also charged with felony violation of a no-contact order. The factor which elevated the crime from a misdemeanor to a felony was Oster's prior convictions for the same crime.[36] The Washington Supreme Court had to determine the adequacy of a to convict instruction that omitted prior convictions as an element of the crime, but were, as here, included in a separate instruction and special verdict form. The *Oster* court concluded it was not an error to instruct the jury separately and by special verdict form on prior criminal history because the instructions clearly set forth all the elements of the crime and the jury did not have to search the other instructions for missing elements.[37] The *Oster* decision therefore recognizes a "limited exception to the rule that all of the elements of the crime must appear in the 'to convict' instruction when

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[33] *Id.*

[34] *Brown*, 132 Wash.2d at 605, 940 P.2d 546.

[35] 147 Wash.2d 141, 52 P.3d 26 (2002).

[36] Oster was charged under former RCW 10.99.040 and .050 (1996), which provided that a violation of a no contact order will be punished as a class C felony if (1) the defendant had two or more prior convictions for the same crime, (2) the violator assaulted the person protected by the order, or (3) the violator recklessly created a substantial risk of death or serious injury. The current statute RCW 25.50.110(4)-(5) contains identical factors which elevate the crime to a felony.

[37] *Oster*, 147 Wash.2d at 147, 52 P.3d 26.

the element is prior convictions, and a special verdict form is used to instruct the jury to determine their existence beyond a reasonable doubt."[38] Although the missing element in this case involves assault rather than prior convictions, the issue and procedure used in *Oster* are almost identical to this case, and we conclude that its rationale logically applies to the instructions in this case as well.

A charge of violation of a no-contact order asks the jury to determine whether the defendant violated a valid no-contact order. If so, the misdemeanor crime is elevated to a felony when (1) the contact that violated the order amounted to misdemeanor assault, (2) the conduct that violated the order was reckless and created a substantial risk of death or serious physical injury to another person, or (3) the defendant has two or more convictions for the same crime.[39] Unlike most crimes, felony violation of a no-contact order is not a separate, distinct crime.[40] Rather, the statute defines a misdemeanor crime and then enumerates the grounds on which the crime is elevated to a felony.

The to convict instruction here did not purport to contain all of the crime's elements. Rather, the trial court

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[38] *Id.* at 148, 52 P.3d 26.

[39] RCW 26.50.110(4)-(5) (2003).

[40] For example, the Revised Code of Washington includes four separate statutes for the crime of assault. While the different felony classes of assault are set forth under RCW 9A.36.011-.31, misdemeanor assault is set forth under its own statute, RCW 9A.36.041. The Revised Code of Washington also separates felony theft from misdemeanor theft. While RCW 9A.56.030-.040 sets forth the elements of felony theft, RCW 9A.56.050 sets forth the elements of misdemeanor theft.

followed the Washington pattern jury instructions[41] and separated felony violation of a no-contact order into two instructions with a special verdict form. Davis argues that the jury should have been given one instruction for felony violation of a no-contact order and a lesser included instruction for misdemeanor violation of a no-contact order. This approach, we conclude, would potentially lead to jury confusion because its construction would be unduly awkward.

When the charge is murder, robbery, assault, and other traditionally-defined crimes and the jury fails to unanimously find any one of the elements, it must acquit on the greater crime. With crimes structured like violation of a no-contact order, the failure to find only one specific element requires the jury to acquit on the greater (felony) crime.[42] Constructing a single instruction on the lesser included model under these circumstances has great potential to confuse the jury and result in erroneous verdicts. Indeed, the statutory structure of the latter crimes is more akin to enhancements like committing a crime while armed with a firearm that the jury regularly decides by special verdict.[43]

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[41] 11 Washington Pattern Jury Instructions: Criminal 36.54-.55 (2d ed.1998).

[42] Other crimes with same statutory construction are harassment (RCW 9A.46.020), indecent exposure (RCW 9A.88.010), and stalking (RCW 9A.46.110).

[43] Former RCW 9.94A.310(3) recodified as RCW 9.94A.510(3) (2001). Drug crime enhancements for proximity to a school, school bus, or park are similar examples. Former RCW 9.94A.310(5) recodified as RCW 9.94A.510(5) (2001).

A defendant benefits from having the instructions bifurcated because the special verdict instruction safeguards him or her from being mistakenly convicted of an elevated crime by a confusing and less direct instruction that attempts to coherently combine the special verdict and the to convict instructions into one.

All the pertinent law need not be incorporated into one instruction.[44] It is only when the jury may have assumed that the to convict instruction is itself a complete statement of the elements of the crime charges that it must in fact include them. Here the trial court followed the Washington Pattern Jury Instructions' (WPIC) bifurcated pattern instructions and placed the special verdict felony instruction after the to convict for misdemeanor violation of a no-contact order instruction. Because of this, it is clear that the court did not intend to provide a "yardstick" with its to convict instruction. The instructions were meant to be read as a whole and each one read in the context of all others.

In addition, there is no danger that this approach confused the jury. As in *Oster*, "no searching was necessary" for the jury in this case.[45] "[E]verything the jury was required to decide was clearly laid out for the jury to decide."[46] Instruction 1 told the jury to consider the instructions as a whole and to not place undue emphasis on any particular instruction or part thereof. Instruction 3 informed the jury that each element was at issue and that the burden of proving each element beyond a reasonable

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[44] *Emmanuel*, 42 Wash.2d at 819, 259 P.2d 845.

[45] *Oster*, 147 Wash.2d at 147, 52 P.3d 26.

[46] *Id.*

doubt rested with the State. Instruction 8 defined the term "assault" for the jury. Instruction 9 provided the elements of violation of a no-contact order. Instruction 12 informed the jury about the special verdict form, instructing them to fill out the form only if they found the defendant guilty of the misdemeanor crime and to answer yes only if they unanimously agreed beyond a reasonable doubt. Instruction 12 and the special verdict form included the enhancing element of assault. When read together, the to convict instruction and the special verdict instruction supply all the crime's elements in the manner suggested by the WPIC.[47] This manner of instructing the jury benefits the defendant as well because the jury was required to conclude, not once but twice, that the State met its burden beyond a reasonable doubt.

Accordingly, we conclude there is no constitutional infirmity. We affirm.

COLEMAN and ELLINGTON, JJ., concur.

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[47] While the WPIC's are not binding on the court, they are persuasive authority. *State v. L.J.M.*, 79 Wash.App. 133, 140, 900 P.2d 1119 (1995), *rev'd on other grounds*, 129 Wash.2d 386, 918 P.2d 898 (1996).

[Appendix A to WACDL's Brief
in the Washington Supreme Court
(Filed May 10, 2004)]

VALLEY COMMUNICATIONS CENTER — **STANDARD OPERATING PROCEDURES**

POLICY NUMBER: 602 — **POLICE INCIDENT INTERVIEW TECHNIQUES**

1.0 PURPOSE/REFERENCES:

To establish a uniform method of interviewing callers requesting police assistance.

CALEA Standards: 6.2.2

2.0 POLICY:

It shall be the policy of Valley Communications Center to conduct thorough and accurate interviews using these guidelines anytime a police related call for service is received.

3.0 PROCEDURE:

On all police related calls, the call taker shall obtain pertinent information, such as where the incident occurred, what type of incident occurred, when the incident occurred, if weapons were involved, who was involved, why it occurred and the reporting party's information. The employee should have thorough knowledge of the POLICE TYPE CODES in order to quickly classify the reporting party's situation and create a CAD incident. A police incident should never be delayed while attempting to determine if a fire department/EMS response is also required. The ACTION CODE "D"

should be utilized for all in-progress and recent incidents. This allows basic information to be forwarded to the dispatcher and a response generated while additional information is obtained and added in supplemental form. The following are guidelines to be used during the interview of a reporting party:

3.1 Where:

3.1.1 Location/address where the incident took place in order to establish jurisdictional responsibility?

3.1.2 Street address, house or apartment number, trailer space or suite number?

3.1.3 Apartment complex, building or business name?

3.2 What:

3.2.1 Type of incident (robbery, burglary, theft)?

3.2.2 What are the potential dangers (situation escalating)?

3.2.3 Are circumstances or injuries present requiring fire/EMS response?

3.3 When (Time Delay):

3.3.1 In Progress (0-5 minutes after occurrence, or suspect on location)?

3.3.2 Recent (6-15 minutes after occurrence)?

3.3.3 Report (16 or more minutes after occurrence)?

3.4 Weapons (Gun or Knife):

3.4.1 Are weapons present or accessible?

3.4.2 What type of weapons?

3.5 Who:

3.5.1 Is the suspect(s) known to reporting party?

3.5.2 Current location of suspect(s)?

3.5.3 Number of suspect?

3.5.4 Name and DOB of suspect(s)?

3.5.5 Description of suspect(s) using head-to-toe method?

3.5.6 Associated vehicle descriptions using CYMBAL method?

3.5.7 Direction of travel?

3.6 Why:

3.6.1 What circumstances led to the incident?

3.6.2 Additional pertinent details relating to incident?

3.7 RP Information:

3.7.1 Name, address, phone number (where can RP be reached)?

3.7.2 Relationship to incident or those involved?

3.7.3 Does the reporting party want officer contact?

Date Originated: 03/03/98 Date Revised: N/A

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154 Wn.2d 291, 111 P.3d 844

Supreme Court of Washington,
En Banc.
STATE of Washington, Respondent,
v.
Adrian Martell DAVIS, Appellant.
No. 73893-9.

Argued Sept. 14, 2004.
Decided May 12, 2005.
As Amended May 31, 2005.

IRELAND, J.*

¶ 1 This case requires us to determine whether the admission of a 911 call violated the defendant's Sixth Amendment right to confrontation under the United States Supreme Court's recent decision in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). We hold that emergency 911 calls should be assessed on a case by-case basis and that the statements made should be individually evaluated for admissibility in light of the confrontation clause. We hold that overwhelming untainted evidence supports Adrian Davis's conviction and that any error in admitting "testimonial" statements without cross-examination was harmless beyond a reasonable doubt.

¶ 2 The defendant also claims that the jury instructions were fatally flawed because the element that raises the crime of domestic violence violation of a court order from a misdemeanor to a felony was not included in the "to convict" instruction, but rather was placed in a special

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* Justice Faith Ireland is serving as a justice pro tempore of the Supreme Court pursuant to Washington Constitution article IV, section 2(a).

interrogatory. We hold that such bifurcation is constitutionally permissible where the legislature has created a statutory framework that establishes a base crime and provides for elevated penalties upon proof of an additional fact as determined by a unanimous jury. We therefore affirm the Court of Appeals.

FACTS

¶ 3 On February 1, 2001, Michelle McCottry called 911. McCottry hung up before speaking to anyone. The 911 operator called McCottry back and asked her what was happening. McCottry was hysterical and crying as she responded, "He's here jumpin' on me again." Ex. 2 (911 audiotape). The 911 operator asked who McCottry was referring to, what his relationship to her was, and whether he had been drinking. McCottry identified her assailant as Adrian Davis. She told the operator that Davis had used his fists to beat her and that he had left the residence moments earlier. McCottry indicated that she had a protective order against Davis.

¶ 4 Police officers Mark Jones and Steve Tamanaha responded within four minutes of McCottry's call to 911. They noted that McCottry was still very upset and had what appeared to be fresh injuries on her forearm and her face. The officers observed McCottry's frantic efforts to gather her belongings and her children so that they could leave the residence.

¶ 5 Davis was charged with one count of felony violation of the provisions of a domestic no-contact order under RCW 26.50.110(1), (4). The State's only witnesses were the two police officers who responded to the 911 call. Both officers testified that McCottry exhibited injuries that

appeared to be recent, but neither officer could testify as to the cause of the injuries. A certified copy of the no-contact order was admitted into evidence.

¶ 6 McCottry did not testify. Although she initially cooperated with the prosecutor's office, the State was unable to locate McCottry at the time of trial. The only evidence linking Davis to her injuries was the tape recording of the 911 call.[1] The defense argued that admission of the 911 tape would violate Davis's right of confrontation, but the court admitted the tape under the excited utterance exception to the hearsay rule. At trial, the court denied the request of Davis's counsel for a missing witness instruction concerning McCottry.

¶ 7 The "to convict" instruction told the jury to convict Davis of domestic violence violation of a court order if the State proved each of the following elements beyond a reasonable doubt:

> (1) That on or about February 1, 2001 the defendant willfully had contact with Michelle McCottry;
>
> (2) That such contact was prohibited by a no-contact order;
>
> (3) That the defendant knew of the existence of the no-contact order;
>
> (4) That the acts occurred in the County of King. Clerk's Papers at 21 (Instruction 9).

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[1] The tape had been redacted to remove references to a police visit to the residence two days earlier for a domestic disturbance between Davis and McCottry.

¶ 8 Instruction 12 directed the jurors to use the special verdict form only if they found the defendant guilty of the crime of violation of a no-contact order. The special verdict form asked if Davis's conduct that constituted a violation of the no-contact order was an assault. In order to answer the special verdict form in the affirmative, the jury was instructed to be unanimously satisfied beyond a reasonable doubt that "yes" was the correct answer. These instructions followed the *Washington Pattern Jury Instructions. See* 11 *Washington Pattern Jury Instructions: Criminal* 36.51, 36.54-36.55 at 182-83, 187-89 (2d ed. Supp.1998) (WPIC).

¶ 9 Davis did not object to the jury instructions, but he did take exception to the court's refusal to give his proposed missing witness instruction. The jury rendered a general verdict of guilty and answered "yes" to the special verdict form.

¶ 10 On appeal, the Court of Appeals rejected Davis's confrontation clause argument. Relying on *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), the Court of Appeals held that the trial court properly classified the 911 call as an excited utterance, which is a firmly rooted exception to the hearsay rule and thus satisfies the requirements of reliability. The court also rejected Davis's arguments that the trial court erred in refusing the missing witness instruction and in placing the assault element in a special interrogatory rather than placing it in the "to convict" instruction. *State v. Davis,* 116 Wash.App. 81, 64 P.3d 661 (2003).

¶ 11 This court granted review and initially consolidated the case with *State v. Mills,* No. 73894-7 (Wash. Apr. 28, 2003), because the primary issue in each case was the

propriety of the "to convict" jury instruction. The cases were argued on November 19, 2003.

¶ 12 Before this court issued an opinion in this case and the *Mills* case, the United States Supreme Court issued its opinion in *Crawford,* which altered confrontation clause analysis. The *Crawford* court held that an out-of-court "testimonial statement" of a witness is inadmissible unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine him or her. On April 30, 2004, Davis filed a motion for oral argument in light of *Crawford.* The State also requested oral argument.

¶ 13 We granted the parties' requests for additional briefing and argument on the issues raised by *Crawford.* After rehearing, we deconsolidated the *Davis* and *Mills* cases and treated them as companion cases, issuing a separate opinion in each case.

ISSUES

¶ 14 1. Did the trial court err in admitting Michelle McCottry's conversation with the 911 operator?

¶ 15 2. Did the trial court err in placing the element that raises the crime from a misdemeanor to a felony in a special verdict form rather than in the "to convict" instruction?

ANALYSIS

Confrontation Clause

¶ 16 The Sixth Amendment confrontation clause provides: In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against

him. U.S. Const. amend. VI. The *Roberts* court determined that the confrontation clause does not bar the statement of an unavailable witness against a criminal defendant if the statement bears "adequate 'indicia of reliability.'" 448 U.S. at 66. Under *Roberts*, adequate reliability could be inferred when the statement either (1) falls within a firmly rooted hearsay exception or (2) contains particularized guarantees of trustworthiness. *Id.*

¶ 17 In *Crawford*, the Supreme Court overturned the *Roberts'* rule that an out-of-court statement was admissible as evidence without confrontation as long as it fell within a firmly rooted hearsay exception or carried other indicia of trustworthiness and reliability, stating that the "[*Roberts'*] framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations." 541 U.S. at 63, 124 S.Ct. 1354.

¶ 18 The *Crawford* court began by examining the historical background of the confrontation clause:

> The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers.
>
> Nonetheless, England at times adopted elements of the civil-law practice. Justices of the peace or other officials examined suspects and witnesses before trial. These examinations were sometimes read in court in lieu of live testimony .... *Id.* at 43, 124 S.Ct. 1354 (citation omitted).

¶ 19 From its examination of the history of the confrontation clause, the Court gleaned two overriding principles: (1) the primary purpose of the confrontation clause was preventing the civil law mode of criminal procedure,

particularly the use of ex parte examinations as evidence against the accused; and (2) the Framers would not have allowed the admission of the testimonial statements of a witness who did not appear at trial unless he or she was unavailable to testify and the defendant had a prior opportunity for cross-examination. *Id.* at 47-48, 53-54, 124 S.Ct. 1354.

¶ 20 The Court declined to spell out a comprehensive definition of "testimonial." But it did give several examples of the types of statements at the core of the definition, including prior testimony at a preliminary hearing, before a grand jury or at a former trial, and police interrogations. "These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Id.* at 68, 124 S.Ct. 1354.

¶ 21 The Court also explained that "testimony," is typically defined as "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Id.* at 51, 124 S.Ct. 1354 (quoting 1 Noah Webster, *An American Dictionary of the English Language* (1828)). "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.* The text of the Sixth Amendment and the history underlying the common-law right of confrontation reflect "an especially acute concern with a specific type of out-of-court statement." *Id.*

¶ 22 In the *Crawford* case, Michael Crawford was charged with assault and attempted murder. *Id.* at 40, 124 S.Ct. 1354. After his wife, Sylvia, was given *Miranda*[2]

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

warnings, she was questioned. *Id.* "Sylvia Crawford made her statement while in police custody, herself a potential suspect in the case .... In response to often leading questions from police detectives, she implicated her husband in [the] stabbing and at least arguably undermined his self-defense claim." *Id.* at 65, 124 S.Ct. 1354. She did not testify at trial because of the marital privilege. *Id.* at 38, 124 S.Ct. 1354. Instead, a tape recording of her statement was played to the jury at the defendant's trial. *Id.* at 40, 124 S.Ct. 1354. The Supreme Court held that Sylvia's recorded statement was testimonial and thus inadmissible because it had not been subject to cross-examination.

¶ 23 A statement may be testimonial by virtue of the manner or mode of its making. For example, Sylvia Crawford's in-custody, tape-recorded statement taken by police officers was deemed "testimonial under even a narrow standard." *Id.* at 52, 124 S.Ct. 1354. Police interrogations are very similar to examinations by justices of the peace, who had essentially investigative and prosecutorial functions. Interrogations by law enforcement officers fall squarely within the classification of testimonial statements. *Id.* at 53, 124 S.Ct. 1354.

¶ 24 On the other hand, *Crawford* allows that "not all hearsay implicates the Sixth Amendment's core concerns." *Id.* at 51, 124 S.Ct. 1354. An offhand, overheard remark, although perhaps objectionable under hearsay rules, "bears little resemblance to the civil-law abuses the Confrontation Clause targeted." *Id.* Further, even testimonial statements may be admitted if offered for purposes other than to prove the truth of the matter asserted. *Id.* at 60 n. 9, 124 S.Ct. 1354.

¶ 25 The primary issue in the present case is whether McCottry's 911 call constitutes a "testimonial" statement under the *Crawford* analysis. The context of a 911 call presents a more complex scenario than the in-custody, *Miranda*-warned interrogation by police officers at issue in *Crawford*. Sylvia Crawford's statement was given during a custodial examination, which the *Crawford* court indicated fell within even a narrow definition of testimonial.

¶ 26 Generally, an emergency 911 call is not of the same nature as an in-custody interrogation by police. Such an emergency call is not the functional equivalent of uncross-examined, in-court testimony. Even though a call to 911 involves personnel associated with the police, the 911 operator is not a police officer. Moreover, the purpose of the call is generally not to "bear witness." The call must be scrutinized to determine whether it is a call for help to be rescued from peril or is generated by a desire to bear witness.

¶ 27 A 911 call is typically initiated by the victim, not the police. Even though an emergency 911 call may assist police in investigation or assist the State in prosecution, where the call is not undertaken for those purposes, it does not resemble the specific type of out-of-court statement with which the Sixth Amendment is concerned.

¶ 28 In *People v. Corella*, 122 Cal.App.4th 461, 18 Cal.Rptr.3d 770 (2004), the court held that admission of a 911 call did not violate the defendant's right to confrontation, and his conviction for corporal injury to his spouse was affirmed. The *Corella* court determined that the statements made to the 911 operator were not "'knowingly given in response to structured police questioning'" and did not have the formal and official quality of the statements deemed testimonial by *Crawford*. 18 Cal.Rptr.3d at

776 (quoting *Crawford,* 541 U.S. at 53 n. 4, 124 S.Ct. 1354).

¶ 29 The *Corella* court further stated that it is difficult to perceive any circumstances under which a statement qualifying as an excited utterance would be testimonial. *Id.* The rationale behind the excited utterance exception to the hearsay rule is that the statement is "made without reflection or deliberation due to the stress of excitement." *Id.* "[S]tatements made without reflection or deliberation are not made in contemplation of their 'testimonial' use in a future trial." *Id. See also State v. Wright,* 686 N.W.2d 295, 302 (Minn.Ct.App.2004) (victims' statements to 911 operator seeking help immediately after assault not testimonial); *Beach v. State,* 816 N.E.2d 57, 59 (Ind.Ct.App.2004) (victim's statement to responding police at scene after assault not testimonial); *State v. Forrest,* 164 N.C.App. 272, 596 S.E.2d 22, 27 (2004) (victim's statements to police upon rescue from defendant nontestimonial).

¶ 30 In most cases, one who calls 911 for emergency help is not "bearing witness," whereas calls made to the police simply to report a crime may conceivably be considered testimonial. It is necessary to look at the circumstances of the 911 call in each case to determine whether the declarant knowingly provided the functional equivalent of testimony to a government agent. *See* Richard D. Friedman, *Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection,* 19 Crim. Just., Summer 2004, at 4, 10 (whether statements made in calls to 911 operators are testimonial requires case-by-case assessment).

¶ 31 Amicus Curiae Washington Association of Criminal Defense Lawyers (WACDL) argues it is common knowledge that 911 calls may be used at subsequent trials and that McCottry reasonably knew her 911 call would later be used to prosecute Davis. Thus, McCottry's call would fit within one of the core classifications of testimonial hearsay listed in *Crawford*. WACDL Br. at 14 (citing Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. Pa. L.Rev. 1171, 1196 (2002)). However, there is no evidence that McCottry had such knowledge or that it influenced her decision to call 911.

¶ 32 The WACDL further argues that if a 911 call involves a completed event, no matter how recent, the caller's remarks will be testimonial. But this argument fails because it focuses on the reliability traditionally accorded excited utterances under hearsay rules by virtue of their spontaneity. *Crawford* rejected the use of evidentiary rules and "amorphous notions of 'reliability'" in assessing whether the protections of the confrontation clause have been satisfied. 541 U.S. at 61, 124 S.Ct. 1354. *Crawford* instructs that for purposes of Sixth Amendment confrontation, the inquiry is whether the "witness" was testifying. As the *Crawford* court explained, the "principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." 541 U.S. at 50, 124 S.Ct. 1354. McCottry's 911 call cannot accurately be described as an ex parte examination or its functional equivalent.

¶ 33 Nor is it accurate to describe the events that occurred during McCottry's call as "completed." The fact that the operator determined McCottry did not need an aid car does not necessarily mean McCottry was out of danger or

that her subsequent responses were then testimonial. Her 911 call was part of an ongoing emergency situation. When the operator called McCottry back, McCottry was crying and hysterical. Only in hindsight was it known that Davis would not reappear and that the assault had ended when he left the residence.

¶ 34 Davis also contends that this call was not a typical 911 call because McCottry hung up and the 911 operator called McCottry back. But the fact that McCottry hung up does not render the phone call testimonial. On the contrary, a hang-up call often signals that the caller is in grave danger, and the 911 operator must return the call to ensure the caller's safety. It would be unwise to label 911 hang-up calls as testimonial simply because the operator must call the victim back to determine the seriousness of the situation. Rather, the circumstances and content of the call should be examined in each case.

¶ 35 Davis points to the prosecutor's closing argument where McCottry's call was described as her "testimony." Report of Proceedings (Sept. 5, 2001) at 55. According to Davis, in using the word "testimony," the State essentially admitted that the 911 call was testimonial. However, the statement was made before the *Crawford* decision focused confrontation clause analysis on the word "testimonial." Since *Crawford,* "testimony" has acquired a specific meaning that should not be attributed to the State pre-*Crawford.*

¶ 36 An emergency 911 call may contain both statements which are nontestimonial and statements which are testimonial. In *Williamson v. United States,* 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994), the Court rejected the "whole statement" approach and held that federal

courts should examine proffered hearsay narrative by separating inculpatory portions from portions which are self-serving and require redaction. 512 U.S. at 603, 114 S.Ct. 2431. We adopted the *Williamson* holding in *State v. Roberts,* 142 Wash.2d 471, 494, 14 P.3d 713 (2000). The *Roberts* court held that erroneous admission or exclusion based upon a "whole statement" approach is subject to harmless error analysis.

¶ 37 A violation of the confrontation clause is also subject to harmless error analysis where the error was harmless beyond a reasonable doubt. *Delaware v. Van Arsdall,* 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); *State v. Smith,* 148 Wash.2d 122, 138-39, 59 P.3d 74 (2002).

¶ 38 Under the facts of the present case, McCottry called 911 because of an immediate danger. There is no evidence McCottry sought to "bear witness" in contemplation of legal proceedings. Nonetheless, certain statements in the call could be deemed to be testimonial to the extent they were not concerned with seeking assistance and protection from peril. However, the information essential to the prosecution of this case was McCottry's initial identification of Davis as her assailant.

¶ 39 To determine whether error is harmless, this court utilizes "the 'overwhelming untainted evidence' test." *Smith,* 148 Wash.2d at 139, 59 P.3d 74. Under that test, where the untainted evidence admitted is so overwhelming as to necessarily lead to a finding of guilt, the error is harmless. *Id.* (citing *State v. Guloy,* 104 Wash.2d 412, 426, 705 P.2d 1182 (1985)).

¶ 40 In this case, the officers arrived four minutes after McCottry's 911 call and observed and documented her fresh injuries with photographs that were introduced into

evidence. The portion of McCottry's 911 call that identified Davis as her assailant was nontestimonial and properly admitted. The certified copy of the prior no-contact order was also admitted into evidence. Thus, the untainted evidence was overwhelming, and any error in admitting testimonial statements from the 911 call was harmless beyond a reasonable doubt.

Preservation of Error

¶ 41 Before addressing the adequacy of the "to convict" instruction, it is necessary to address the State's argument that Davis waived his right to challenge the "to convict" jury instruction because he did not take exception to the instruction at trial.

¶ 42 Although recognizing this court's power to review constitutional errors, the State argues the alleged error lacked the "manifest" requirement of RAP 2.5(a)(3), which permits a party to raise for the first time on appeal a "manifest error affecting a constitutional right." The Court of Appeals properly rejected this argument.

¶ 43 The State argues that Davis cannot show practical and identifiable consequences as a result of the bifurcated element. But, as we recently held in *State v. Mills,* 154 Wash.2d 1, 109 P.3d 415 (2005), the "to convict" instruction carries special weight because the jury relies on it as a "yardstick" by which to determine a defendant's guilt or innocence. *Id.* at 417. The issue of omission of an element from a "to convict" instruction is of sufficient constitutional magnitude to warrant review of a challenge to the instruction raised for the first time on appeal. Accordingly, we address the merits of Davis's challenge.

"To Convict" Jury Instruction

¶ 44 Davis argues the bifurcation from the "to convict" instruction of the assault element, which elevates his base misdemeanor crime to a felony, unconstitutionally relieved the State of proving the element of assault, thereby violating his constitutional rights to due process[3] and to a jury trial.[4]

¶ 45 The State responds by asserting that the jury did find every element of the crime beyond a reasonable doubt, and that appearance of the elevating fact in a special verdict form does not deny a defendant due process, as the practice has been traditionally utilized and approved in other crimes where an elevating fact increases the statutory penalty.

¶ 46 We recently discussed this issue at length in *Mills*. There we held that where the legislature has established a statutory framework which defines a base crime that may be elevated to a greater crime if a certain fact is present, a trial court may, consistent with the guaranties of due process and trial by jury, bifurcate the elevating fact into a special verdict form. As long as the jury is instructed it must unanimously agree beyond a reasonable doubt

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[3] *See* U.S. Const. amend. XIV ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law."); Wash. Const. art. I § 3 ("No person shall be deprived of life, liberty, or property, without due process of law.").

[4] *See* U.S. Const. art. III § 2 ("The trial of all crimes, except in cases of impeachment, shall be by jury."); U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."); Wash. Const. art. I § 21 ("The right of trial by jury shall remain inviolate."); Wash. Const. art. I § 22 ("In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury.").

before it may affirmatively answer the special verdict, the constitution is not offended.[5] Because the jury unanimously found all elements necessary to convict Davis, the instructions were sufficient here.

CONCLUSION

¶ 47 Finding that any error in admitting testimonial statements from McCottry's emergency 911 call was harmless beyond a reasonable doubt, and that there was no error in the "to convict" instruction, we affirm the Court of Appeals.

ALEXANDER, C.J., C. JOHNSON, MADSEN, BRIDGE, CHAMBERS, OWENS and FAIRHURST, JJ., concur.

SANDERS, J. (dissenting).

¶ 48 The majority is correct that every 911 call must be evaluated on a case-by-case basis to determine whether the contents are testimonial under *Crawford*.[1] Majority at 846, 850. The majority is also correct that logically discrete segments of the 911 call must be analyzed separately.[2] Majority at 851. However, the majority errs when

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[5] In *Mills*, however, we emphasized that while such bifurcation is constitutionally *permissible*, it is not constitutionally *required*. There would have been no constitutional violation had the trial court in the case before us provided a single "to convict" instruction that included the assault element without using the special verdict approach from WPIC 36.54-36.55.

[1] *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

[2] Given the majority's holding that 911 calls must be evaluated as testimonial on a case-by-case basis and that discrete portions of 911 calls must be analyzed separately to determine if they are testimonial,

(Continued on following page)

it suggests – though it does not *hold* – that a relevant factor is the *subjective intent* of the absent witness to provide information to be used in an accused's prosecution, rather than an *objective* evaluation of whether a reasonable person would know that their statements could be used to prosecute. The majority also errs in its evaluation of the facts of this case. Because I would hold that under the specific circumstances of this case all of Michelle McCottry's statements are testimonial, I dissent.

¶ 49 *Crawford* defined as the "core class of 'testimonial' statements . . . pretrial statements that declarants would *reasonably* expect to be used prosecutorially . . . [and] 'statements that were made under circumstances which would lead an *objective* witness *reasonably* to believe that the statement would be available for use at a later trial.'" *Crawford,* 541 U.S. at 51-52, 124 S.Ct. 1354 (emphasis added). The focus on reasonableness dictates an objective standard, evaluated by whether a reasonable person would "expect [the statement] to be used prosecutorially," not a subjective determination of whether the 911 caller actually knew that his or her statement would be used prosecutorially. Yet the majority focuses on the *lack* of evidence that McCottry "knew" her 911 call would be used to prosecute Adrian Davis.[3]

¶ 50 The proper inquiry, as required by the United States Supreme Court's use of the terms "objective" and

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the majority's generalizations regarding 911 calls (majority at 849-850) are pure dicta.

[3] "However, there is no evidence that McCottry had such knowledge or that it influenced her decision to call 911." Majority at 850. "There is no evidence McCottry sought to 'bear witness' in contemplation of legal proceedings." Majority at 851.

"reasonably," and as recognized by lower courts and leading commentators who have examined the issue, is whether a reasonable person in the 911 caller's position would know that their statement "is likely to be used in investigation or prosecution of a crime." *People v. Cortes,* 4 Misc.3d 575, 781 N.Y.S.2d 401, 2004 WL 1258018, (citing Richard D. Friedman & Bridget McCormack, *Dial-In Testimony,* 150 U. PA. L.REV. 1171, 1241 (2002)).

¶ 51 The United States Court of Appeals for the Sixth Circuit stated:

> The proper inquiry, then, is whether the declarant intends to bear testimony against the accused. That intent, in turn, may be determined by querying whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime.
>
> *United States v. Cromer,* 389 F.3d 662, 675 (6th Cir.2004).

¶ 52 Objectively, given the extensive media coverage of the use of 911 calls in the prosecution of crimes, the endless police and legal procedural dramas in which such usage plays a key role, and the nature of the questioning that occurs during the call, a reasonable person today who calls 911 in connection with a criminal act could anticipate that his or her statement would be used in investigating and prosecuting the crime.

¶ 53 Professor Richard Friedman, a leading expert on the confrontation clause whose framework for analyzing the clause was adopted by the United States Supreme Court in *Crawford,* stated in his seminal article on 911 calls and the Confrontation Clause: "Now consider statements made

in 911 calls . . . . A reasonable person knows she is speaking to officialdom – either police officers or agents whose regular employment calls on them to pass information on to law enforcement, from whom it may go to the prosecutorial authorities." Friedman & McCormack, *supra,* at 1242.

¶ 54 Even under the circumstances of this case it is clear that a reasonable person in McCottry's position would have known that her 911 call would have resulted in Davis' prosecution and that the information relayed in the call would be used in that prosecution. As the majority notes, Davis was charged with felony violation of a no-contact order under chapter 26.50 RCW. Majority at ___. Under that chapter McCottry would have had to obtain the no-contact order, would have received a copy of that order, and would have been notified at that time of the criminal penalties for violating the order. RCW 26.50.035(1)(c); *see also, e.g., State v. Powers,* 124 Wash.App. 92, 97, 99 P.3d 1262 (2004).

¶ 55 Professor Friedman's most recent post-*Crawford* work sets forth the best reasoned structure for analyzing whether an absent witness's statement is testimonial: "Whether a statement is deemed to be testimonial . . . depends on whether the statement fulfills the function of prosecution testimony. That function, in rough terms, is the transmittal of information for use in prosecution." Richard D. Friedman, *Grappling with the Meaning of "Testimonial,"* http://wwwpersonal.umich.edu/rdfrdman/Grappling1.pdf at 2. It is clear that the 911 call in this case fulfilled the function of transmitting such information.

¶ 56 I agree that in some instances a 911 call that is truly only an "amplified cry for help" might not be testimonial;[4] however, most 911 calls – or at least the great majority of the content of most 911 calls – will not fall into this category. Most 911 calls today are conducted according to a "script" composed and directed by agents for investigating authorities, as was the case here. These "scripts" constitute an interrogation just as effective as if a police officer were questioning the absent witness directly.[5] And *Crawford* held that interrogations by agents of the government, such as police officers, are "testimonial under even a narrow standard." *Crawford,* 541 U.S. at 52, 124 S.Ct. 1354.

¶ 57 As the majority notes, someone at the McCottry residence called 911. State's Ex. 2 (911 tape).[6] The 911 tape does not establish that McCottry herself made the initial call. The 911 operator then called the residence back, and McCottry answered. While McCottry was upset, the

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[4] *See* Richard D. Friedman, *Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection,* 19 CRIM. JUST., Summer 2004, 4, 10. Professor Friedman actually identified the Court of Appeals opinion in the case at bar as one in which the caller "is fully aware that what she says has potential evidentiary value against the alleged assailant." *Id.*

[5] The Valley Communications Center "Standard Operating Procedures – Policy Number 602: Police Incident Interview Techniques" contained a series of questions that were followed almost exactly by the 911 questioner in this case. Those questions began with what transpired, where the incident occurred, when it occurred, who was involved, where the suspect went, and the circumstance which led to the incident. Br. of Wash. Ass'n of Criminal Def. Lawyers, app. at 1.

[6] The majority opinion assumes the caller was McCottry. Majority at 851. But there is no indication on the 911 tape, or in the testimony of the two officers who were the only trial witnesses, that McCottry was the caller.

majority mischaracterizes the tape when the majority describes McCottry as "hysterical and crying." Majority at 846, 850. In fact, the first sounds heard in the call-back are not those reflected in the official transcript of the tape, but rather McCottry instructing an unknown person to "put [unintelligible] down," and a male voice responding "c'mon baby." Ex. 2.[7] It is a full 10 seconds before McCottry answers the 911 operator's "hello."

¶ 58 During that 10 seconds McCottry does not ask for help. In fact, at no time does McCottry ask for help. In response to the 911 operator's *question* McCottry stated that Davis had been "jumpin' on me again" and had been "usin' his fists." Ex. 2.

¶ 59 This is not the amplified "call for help" that most courts and commentators have identified as potentially "nontestimonial." McCottry's response was no different than if she had been called by the police directly and asked by an officer what had transpired, for example if a

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[7] It is not clear that Davis is the person to whom McCottry was initially talking. During the 911 call McCottry acknowledged that, in addition to three children (Report of Proceedings (RP) at 75), there was also at least one other male in the house she had invited over ("Mike"). Ex. 2; Clerk's Papers (CP) at 2 (Certification). There were at least five persons in the house to whom McCottry might initially have been speaking. Further, according to the Certification for Determination of Probable Cause, McCottry had been arguing with the male friend "Mike" when Davis arrived. CP at 2. "Mike" and Davis drove away together in Mike's car. CP at 2. In addition, McCottry and the officers who responded to the call indicated that McCottry was in the process of moving, perhaps providing context for the instruction to put something or someone down. RP at 76. When the officers arrived, McCottry was alone in the house with the children. RP at 75. "Mike" was not identified in the police report, and was not called to testify at the trial, in spite of the fact that Mike presumably witnessed the events that took place.

neighbor had reported a disturbance. That interrogation would clearly have been testimonial under *Crawford*.

¶ 60 The majority focuses on the fact that the "911 call was part of an ongoing emergency situation." Majority at 850. While this may have relevance to show that the call was potentially an "excited utterance," that inquiry is relevant to whether the call met an exception to the evidentiary rule excluding hearsay, not whether it was testimonial.[8] Certainly a witness reporting an ongoing crime is part of an "ongoing emergency situation." It is nonetheless testimonial. *Cortes*, 4 Misc.3d at 595, 781 N.Y.S.2d 401.

¶ 61 Finally, the majority concludes that "certain statements in the call could be deemed to be testimonial to the extent they were not concerned with seeking assistance and protection from peril. However, the information essential to the prosecution of this case was McCottry's initial identification of Davis as her assailant." Majority at 851. Putting aside the fact that McCottry never "sought assistance," the majority appears to conclude that everything after the initial identification is testimonial. And presumably the majority's term "initial identification" is shorthand for both the identification and the statement that Davis had hit McCottry, since without the statement

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[8] The United States Supreme Court in *Crawford* explicitly disconnected these inquiries, noting that such indicia of "reliability" are "so unpredictable that it fails to provide meaningful protection from even core confrontation violations." *Crawford*, 541 U.S. at 62-63, 124 S.Ct. 1354. *Crawford* also questioned whether "spontaneous declarations" – the exception to the hearsay rule, from which the "excited utterance" doctrine was derived, *see State v. Branch*, 182 N.J. 338, 865 A.2d 673 (2005) – which were testimonial would have been admissible in 1791. *Crawford*, 541 U.S. at 58 n. 8, 124 S.Ct. 1354.

there was no proof that Davis assaulted McCottry. But the majority does not explain how the "initial identification," provided in response to structured questioning by a governmental agent, is nontestimonial.

¶ 62 It was not a "cry for help." It was a result of government-initiated interrogation. It was testimonial. Its admission violated the confrontation clause contained in the Sixth Amendment to the United States Constitution.[9] Given that there was no evidence introduced at trial other than the 911 tape which showed that Davis assaulted McCottry or violated the no-contact order, the admission of the tape was not harmless.

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[9] "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. While the parties in this case contend only that introduction of the 911 tape violated the federal constitution, we should recall article I, section 22 of the Washington State Constitution ("In criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face.") differs significantly in text and deserves independent consideration when properly raised, as five justices of this court concluded in *State v. Foster*, 135 Wash.2d 441, 473, 481, 957 P.2d 712 (1998).

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No. 05-5224

IN THE
Supreme Court of the United States

ADRIAN MARTELL DAVIS,
Petitioner,

v.

WASHINGTON,
Respondent.

On Writ of Certiorari
to the Supreme Court of Washington

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether an alleged victim's statements to a 911 operator naming her assailant – admitted as "excited utterances" under a jurisdiction's hearsay law – constitute "testimonial" statements subject to the Confrontation Clause restrictions enunciated in *Crawford v. Washington*, 541 U.S. 36 (2004).

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Washington Supreme Court is reported at 154 Wn.2d 291, 111 P.3d 844 (2005), and appears at J.A. 116-138. The opinion of the Washington Court of Appeals is published at 116 Wn. App. 81, 64 P.3d 661 (2003), and appears at J.A. 96-111. The relevant orders of the trial court are unpublished and appear at J.A. 34-68.

STATEMENT OF JURISDICTION

The Washington Supreme Court issued its opinion on May 12, 2005, and amended it on May 31, 2005. J.A. 116. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

Washington Rule of Evidence 803(a) provides in relevant part: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (2) *Excited Utterance.* A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

STATEMENT OF THE CASE

This case presents an example of a recent practice that prosecutors call "victimless" prosecutions. The hallmark of such cases is not that they lack a victim, but rather that they lack any in-court testimony from a victim. Prosecutors seek to

prove the defendant's guilt principally by means of *out-of-court* accusations – typically, reports people make right after alleged crimes to police or other personnel associated with law enforcement. *See generally* Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. Pa. L. Rev. 1171, 1173-80 (2002).

Prosecutions were "rarely if ever" conducted on this basis before the mid-1990's. *Id.* at 1223. But after this Court held in *Ohio v. Roberts*, 448 U.S. 56 (1980), that the Sixth Amendment's Confrontation Clause required only that judges deem out-of-court accusations "reliable," prosecutors came to realize that the *Roberts* framework allowed them to satisfy constitutional demands simply by introducing out-of-court accusations under their local hearsay law as "excited utterances." *See, e.g., White v. Illinois*, 502 U.S. 346 (1992) (making clear that excited utterances were automatically admissible under *Roberts* framework regardless of declarant's unavailability); Andrew King-Reis, Crawford v. Washington: *The End of Victimless Prosecution?*, 28 Seattle L. Rev. 301, 309 (2005) (authored by former Washington prosecutor). There was no need to ask alleged victims ever to appear in court.

In *Crawford v. Washington*, 541 U.S. 36 (2004), however, this Court abrogated the *Roberts* framework, restoring the Confrontation Clause to its traditional mode of operation. Now, once again, the Clause imposes a categorical procedural requirement that prosecutors make the declarants of any incriminating "testimonial" statements available for cross-examination.

The question this case presents is how *Crawford* applies to a "victimless" prosecution based almost exclusively on statements reporting a crime to a 911 operator. Although the prosecutor characterized this report to the jury as the alleged victim's "testimony" on the day she was assaulted, J.A. 81, and

used the report for exactly that purpose at trial, a majority of the Washington Supreme Court held that the alleged victim's answers to the 911 operator's questions were "nontestimonial" and properly admitted.

1. The City of Kent, Washington, like other political subdivisions in the United States, maintains a 911 telephone system. Dialing 911 connects a caller with an operator "associated with the police," J.A. 124, and allows the caller to request emergency assistance or to register less urgent complaints. The City's website advises its citizens: "If you need to see a police officer, want to report a crime, or observe suspicious activity, call 9-1-1. Even if it is not an 'emergency.'" City of Kent, Washington, *Dial 9-1-1 for Emergencies*, <http://www.ci.kent.wa.us/emergency/ 911.asp> (last visited Dec. 21, 2005).

911 operators in Kent, as elsewhere, are trained to gather information from callers and to coordinate quick responses. In order to maintain "a uniform method of interviewing callers requesting police assistance," Policy 602 of the Standard Operating Procedures for Kent's 911 system supplies detailed guidelines "to be used during the interview of a reporting party" during a "police incident interview." J.A. 112-13; *see also* J.A. 135 n.5 (Sanders, J., dissenting) (discussing this Policy). It instructs: "On all police related calls, the call taker shall obtain pertinent information, such as where the incident occurred, what type of incident occurred, when the incident occurred, if weapons were involved, who was involved, why it occurred and the reporting party's information." J.A. 112. The Policy then outlines several suggested questions for obtaining this information. J.A. 113-16. Because "[a]n officer may arrest a subject on information given to him by a [911 operator]," the Standard Operating Procedures direct operators to "[q]uestion aggressively" and to "[b]e tenacious in obtaining information from reporting parties." Standard Operating Procedures, Section 4, at 29.

While people call 911 to report all sorts of crimes, the State of Washington, like other states, especially encourages people to use 911 systems to report incidents of domestic violence and, particularly, violations of protection orders. The Washington state courts' website, for example, contains a series of webpages dedicated exclusively to domestic violence. A webpage concerning protection orders advises: "When you believe a violation of the terms of the protection order has occurred, you should call 911 or your local police to request an officer for any needed emergency assistance and to take a report of the violation." Washington Courts, *Domestic Violence Protection Order Process, Violation of Protection Orders, What You Should Do If the Order is Violated*, <http://www.courts.wa.gov/dv/?fa=dv_order.ordviol> (last visited Dec. 21, 2005). The webpage explains that violating a restraint from causing or threatening harm is a crime – "up to a Class C felony" – and that committing domestic violence "subjects the Respondent to a MANDATORY ARREST." *Id.*; *see also City of Tacoma v. State*, 117 Wn.2d 348, 352 (1991) (describing Washington's mandatory arrest laws).[1] Washington police departments and other local governmental entities also publicize their 911 systems to potential domestic-violence complainants and instruct that such reports will trigger mandatory arrests and other kinds of police enforcement.[2]

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[1] Washington's mandatory arrest laws are typical. *See* Friedman & McCormack, 150 U. Pa. L. Rev. at 1184-85 (surveying laws in other states and municipalities).

[2] For example, the website for King County, where this case arises, contains a webpage dealing exclusively with domestic violence and providing information regarding applicable legal procedures. *See* King County, *If You Think You Are or Might Be a Victim of Domestic Violence*, <http://www.metrokc.gov/dvinfo/dv1_0.htm> (last visited Dec. 21, 2005) ("If the police believe they have probable cause to suspect that a person assaulted you within the previous four-hour period, they are required to arrest the person who committed the assault. That is the law."); King

2. Just before noon on February, 1, 2001, Michelle McCottry, a resident of Kent, called 911 to report that her ex-boyfriend had violated her protection order against him. A 911 operator answered, but McCottry hung up before saying anything. The operator called McCottry right back and asked her what was going on. McCottry, who sounded "hysterical and crying," explained that a man who "had left the residence moments earlier" had beat her with his fists. J.A. 117. After the operator told McCottry she had "help started" (presumably meaning that police were on the way) the operator urged McCottry to "[l]isten to me carefully," J.A. 9, and then commenced a series of questions that "followed [Policy 602] almost exactly." J.A. 135 n.5 (Sanders, J., dissenting). This part of the call began with the following exchange:

911 Operator:	. . . Do you know his last name?
Complainant:	It's Davis.
911 Operator:	Davis? Okay, What's his first name?
Complainant:	Adran.
911 Operator:	What is it?
Complainant:	Adrian.
911 Operator:	Adrian.
Complainant:	Yeah.
911 Operator:	Okay. What's his middle initial?
Complainant:	Martell. . . .

J.A. 9. Later in the interview, which lasted about four minutes, McCottry described the circumstances that allegedly gave rise to the assault, provided the operator Davis' birthdate, and answered questions concerning the protection order against him. J.A. 10, 12. McCottry also informed the operator that the

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County, *Information About the Law Against Domestic Violence and About Courts and the Protection Order Process*, <http://www.metrokc.gov/dvinfo/dv6_0.htm> (last visited Dec. 21, 2005) ("Once you have a valid Order for Protection, if it is violated, you should call 9-1-1 and ask the police to help you by enforcing it.").

police had been at her house two days earlier for another domestic disturbance between her and Davis. J.A. 21, 118 n.1.[3]

At one point during the call, McCottry told the operator that another man also had just been in her house – a man she later told the police was named "Mike" – but the operator never asked any follow-up questions about him. J.A. 10; *see also* J.A. 136 n.7 (Sanders, J., dissenting). At another point, the operator asked McCottry whether she needed an "aid car." McCottry answered, "No, I'm all right." J.A. 10.

Two police officers arrived at McCottry's house minutes after the 911 call ended. "They noted that McCottry was still very upset and had what appeared to be fresh injuries on her forearm and her face." J.A. 117. The officers immediately began documenting the particulars of McCottry's complaint, asking her questions regarding the incident and tape recording her responses. Report of Proceedings (Sept. 4, 2001) at 37. McCottry told the officers that she had gotten involved in a verbal argument with Mike and that Davis had physically assaulted her. J.A. 136 n.7 (Sanders, J., dissenting). The police later arrested Davis. They never obtained Mike's full name or tried to seek him out in connection with the case. *Id.*; *see also* Report of Proceedings (Sept. 4, 2001), at 18, 23-24.

3. The State charged Davis with one count of violating a domestic order of protection, Wash. Rev. Code § 26.50.110(1) & (4), a charge that the State elevated to a felony by including a special allegation that Davis assaulted McCottry. J.A. 6-7, 130.

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[3] The two passages from the call in which McCottry tells the operator that the police were at her house two days ago were redacted for trial on the ground that their prejudicial effect outweighed their probative value. J.A. 118 n.1. The trial court, of course, had access to the entire 911 call to make its Confrontation Clause and hearsay rulings. J.A. 21, 34.

During pretrial hearings, the prosecutor acknowledged to the court that McCottry had told her that "she wasn't happy that we were proceeding with this case." Report of Proceedings (Aug. 29, 2001), at 44. And on the eve of trial, McCottry failed to appear for her pretrial interview with defense counsel. But the State advised the court that it intended to press on anyway and that it expected to be able to produce McCottry for trial. J.A. 18.

On the morning of trial, the State told the court that McCottry would not, in fact, be coming to testify at trial. Upon learning this, Davis' attorney complained that "the State has chosen not to compel her to come to Court to tell the jury in person what occurred," thereby depriving the defense of its ability "to cross-examine her." J.A. 41, 43. Davis' attorney later made a formal motion to that effect, arguing that "because Mr. Davis cannot confront his accuser he's denied his constitutional rights" under the Sixth Amendment's Confrontation Clause. J.A. 41, 43. Although the State previously had acknowledged that this case "comes down to credibility issues between . . . the complaining victim and the defendant," Report of Proceedings (Sept. 4, 2001), at 44, it took the position that "the confrontation clause is not violated if the information that is allowed into the record" from a nontestifying victim "falls under the excited utterance rule, which is what we have here." J.A. 60; *see also* J.A. 43.

The trial court sided with the State. Although the court excluded McCottry's later statements to the officers, J.A. 34-40, it ruled that all of McCottry's answers to the 911 operator's questions constituted excited utterances. J.A. 34. And because the statements were excited utterances, they automatically were admissible under the *Roberts* framework for assessing Confrontation Clause objections, "even if the declarant is available as a witness but does not testify." J.A. 65 (citing *White v. Illinois*, 502 U.S. 346 (1992)).

During the trial, the State presented testimony from only two live witnesses, the two police officers who had responded to McCottry's call. The prosecutor also played the 911 tape. Davis' attorney argued in closing that there was insufficient evidence to convict. She emphasized that the State had not presented any eyewitnesses to the alleged assault, and that the only evidence suggesting Davis was ever even in McCottry's house on the day at issue – McCottry's statements during the 911 call – had not been given in the presence of the jury, under oath, or even subject to cross-examination. J.A. 75-76.

The prosecutor offered the following rebuttal:

> [Davis' attorney] would like you to believe that . . . no one you heard from saw this crime. That is not true. You have the voice of Ms. McCottry on that 911 tape. She reported it right when it happened.
>
> . . . .
>
> And if you really, truly want to think about this, as you must, just consider that there was a person present and that person is Ms. McCottry and although she is not here today to talk to you she left you something better. *She left you her testimony on the day that this happened,* February 1st, 2001, this shows that the defendant, Adrian Davis was at her home and assaulted her. *It is right here in her voice.*

J.A. 80-81 (emphasis added). The prosecutor then played the 911 tape again, quickly summarized how this "testimony" established the elements of the crime charged, and rested her case. J.A. 81-82.

The jury returned a guilty verdict, and the court sentenced Davis to 15 months in prison, a sentence within Washington's "standard range" for this crime. J.A. 85, 88.

4. The Washington Court of Appeals affirmed Davis' conviction. As is relevant here, the Court of Appeals held that the trial court properly classified all of McCottry's answers to the 911 operator's questions as excited utterances. J.A. 98. It also agreed with the trial court that the State's use of the 911 tape satisfied the *Roberts* framework. J.A. 97-101. The *Roberts* framework provided that any out-of-court statements falling within a "firmly rooted" hearsay exception were sufficiently reliable to be offered against the accused, and that the excited utterance exception was a firmly rooted one. J.A. 98.

5. The Washington Supreme Court granted Davis' petition for discretionary review. While the case was pending, this Court abandoned the *Roberts* framework and held in *Crawford v. Washington*, 541 U.S. 36 (2004), that the Confrontation Clause bars the use of "testimonial" hearsay against criminal defendants unless the declarants are unavailable and the defendants had a prior opportunity to cross-examine them. The Washington Supreme Court received supplemental briefing and held a second oral argument concerning whether the State's use of the 911 call contravened *Crawford*.

The Washington Supreme Court held, by an 8-1 vote, that "the information essential to the prosecution of this case was McCottry's initial identification of Davis as her assailant" and that that identification was "nontestimonial and properly admitted." J.A. 128-29. The majority discussed a California appellate decision saying it was doubtful whether there could exist "any circumstances under which a statement qualifying as an excited utterance would be testimonial." J.A. 125 (citing *People v. Corella*, 18 Cal. Rptr. 3d 770, 776 (Cal. App. 2004)).

Without resolving this doubt, the majority asserted that a 911 call "must be scrutinized to determine whether it is a call for help to be rescued from peril or is generated by a desire to bear witness." J.A. 124. Apparently positing that every 911 call could neatly be characterized as one or the other, the majority concluded that McCottry's identification of Davis was nontestimonial because "there is no evidence that McCottry sought to 'bear witness' in contemplation of legal proceedings." J.A. 128.

Justice Sanders dissented. He found it irrelevant that McCottry's responses to the 911 operator's questions qualified as excited utterances. J.A. 137. In addition, the dissent rejected the majority's test requiring an inquiry into the subjective intent of 911 callers. It read *Crawford* to "dictate[] an objective standard," focusing on "whether the statement fulfills the function of prosecution testimony." J.A. 134 (quotation omitted). The dissent found it "clear that the 911 call in this case fulfilled th[at] function." *Id.* "[A] reasonable person today who calls 911 in connection with a criminal act could anticipate that his or her statement would be used in investigating and prosecuting a crime." J.A. 133. Finally, the dissent noted that even though some people may call 911 and ask to be rescued from peril, McCottry never "ask[ed] for help," so "[t]his [case does not present] the amplified 'call for help' that most courts and commentators have identified as potentially 'nontestimonial.'" J.A. 136.

SUMMARY OF ARGUMENT

McCottry's answers to the 911 operator's questions accusing Davis of having just assaulted her were "testimonial" and should have been excluded from trial.

I. The right to confrontation, as originally understood, prohibited prosecutions based on nontestifying witnesses' accusations to governmental agents that someone committed a

crime – no matter how "excited" declarants were at the time or how contemporaneously their accusations were made with the alleged transgression.

A. From its earliest origins over two thousand years ago, the core of the right to confrontation has consisted of a guarantee that the accused shall be confronted with his "accuser." The early Romans used that nomenclature; English common law authorities characterized the right that way; and this Court consistently has done the same. It thus is plain that the Framers, if nothing else, meant to constitutionalize this elementary prohibition against using out-of-court accusations to convict criminal defendants.

B. The traditional confrontation rule governing accusatory statements to governmental agents did not exempt accusations made right after the acts allegedly occurred or otherwise made under the stress of excitement. People during the Founding era had opportunities – and often a duty – to report felonious acts to local constables and bailiffs as soon as they occurred. Like 911 calls today, these reports – commonly called "hues and cries" – typically served the dual purpose of seeking help and initiating the workings of law enforcement. Yet these reports were inadmissible in criminal trials because they were not given under oath or subject to cross-examination. Indeed, if anything, contemporaneous authorities viewed these fresh reports as *less* acceptable substitutes for live testimony than other, more formal kinds of *ex parte* examinations.

C. The nascent hearsay rule during the Founding era (and for a considerable period thereafter) respected and reinforced the confrontation rule that, if witnesses did not testify at trial, their statements reporting criminal acts were inadmissible for the truth of the matter asserted. There was no such thing as an "excited utterance" exception in 1791. Instead, prevailing authorities distinguished between statements that were part of the *res gestae* – that is, the incident

itself – from statements that described completed acts. And deep into the 19th century, courts in criminal cases rigorously excluded the latter from evidence, prohibiting prosecutors from introducing victims' declarations identifying who had just shot, stabbed, or otherwise harmed them. It did not matter whether a declarant also had asked for help; whether a declarant had been trying to assist in apprehending the offender; or whether the statement was made so contemporaneously with the incident and under such mental conditions as practically to guarantee its truth. If the victims did not testify at trial, the absence of an oath and the defendants' inability to cross-examine their accusers precluded admitting the out-of-court declarations to prove the defendants' guilt.

Hearsay law, especially during the era of *Ohio v. Roberts,* 448 U.S. 56 (1980), eventually drifted away from this strict *res gestae* rule, to the point where some states, such as Washington, now regularly allow the admission of statements describing past criminal acts under the "excited utterance" exception. But current evidence law blesses such statements because of their perceived reliability. While this consideration is perfectly legitimate in some contexts, it is "fundamentally at odds with the right to confrontation," *Crawford v. Washington,* 541 U.S. 36, 61 (2004), and thus the Framers would not have accepted it as a justification for admitting nontestifying witnesses' testimonial statements against defendants in criminal cases.

II. There is no reason in the modern context of 911 calls to depart from the traditional categorical rule that statements, as here, reporting crimes to governmental agents are testimonial.

A. The practice of trying defendants based on accusations a person makes in response to a 911 operator's questions is antithetical to the adversarial process that *Crawford*'s testimonial principle is designed to protect.

Operators conduct what they call "police incident interviews" according to a detailed script, designed in large measure to elicit information for use in apprehending and prosecuting offenders. And callers, particularly those reporting domestic violence, are amply aware that law enforcement may use their accusations in this way. Whatever the outer boundaries of the testimonial principle may be, this type of governmentally generated dialogue is more than sufficient to trigger confrontation concerns. To hold otherwise would be to say that the government may establish a system for reporting crimes to the police and for conducting *ex parte* interviews of complainants, and then use recordings of those interviews as a substitute for live testimony at trial. It is hard to imagine a proposition that would have more offended the Framers of the Sixth Amendment.

B. That some people call 911 at least in part to seek help does not render any of McCottry's statements in this case nontestimonial. The relevant question – to the extent constitutional text and historical inferences do not resolve whether a type of statement is testimonial – should not be *why* someone makes certain statements to a governmental agent, but whether declarants *reasonably would have anticipated* that their statements might be used for law enforcement purposes. That standard is satisfied here.

To be sure, the simple fact that a person called 911 and asked for help may be admissible in criminal cases. But McCottry never asked for help, and the prosecutor never used McCottry's statements to suggest she did. Rather, the prosecutor introduced the 911 call as the principal evidence of Davis' guilt and told the jury that it constituted "her testimony on the day that this happened, . . . show[ing] that the defendant, Adrian Davis was at her home and assaulted her." J.A. 81. This common-sense characterization of the recording the prosecutor then played confirms what should have been obvious to the Washington Supreme Court: that McCottry's

answers to the 911 operator's questions were testimonial and improperly admitted at trial.

ARGUMENT

In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court held that "testimonial" statements may not be introduced at trial against criminal defendants unless the declarants are unavailable and the defendants had an opportunity to cross-examine them. It is undisputed that those conditions were not satisfied here. This case turns, therefore, on whether Michelle McCottry's 911 declarations in which she accused Davis of violating the protection order and assaulting her were testimonial. The text, history, structure, and purpose of the Confrontation Clause confirm that they were, and that the Washington Supreme Court erred in holding to the contrary.

I. The Right To Confrontation, As Originally Understood, Prohibited Prosecutions Based On Non-testifying Witnesses' Accusations To Governmental Agents That Someone Had Just Committed A Crime.

The Sixth Amendment guarantees to the accused the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. This Court in *Crawford* held that a person acts as a "witness against" another when he or she makes "testimonial" statements. Although this Court in *Crawford* declined to adopt a "comprehensive" definition of the term "testimonial," 541 U.S. at 68, it established that the starting point for assessing whether any particular statement is testimonial is to determine whether the right to confrontation, as originally understood, applied to that type of statement. *Id.* at 42-53. When, as here, the statement at issue arises in the context of "a phenomenon that did not exist at the time of [the Sixth Amendment's] adoption" – in this case, a 911 system – the task is to "estimat[e] as accurate[ly] as possible" how the Framers would

have applied the constitutional right to that situation. *Id.* at 52 n.3.

Despite the clarity of these instructions in *Crawford,* the Washington Supreme Court never paused to consider whether the Framers would have considered reporting a crime to a governmental agent right after it allegedly happened to implicate the Confrontation Clause. This was a serious error, for a review of pertinent historical sources demonstrates that the Framers would have understood the right to confrontation to apply to such accusatory statements.

A. Accusatory Statements Always Have Rested At The Heart Of The Right To Confrontation.

"The right to confront one's accusers is a concept that dates back to Roman times." *Crawford,* 541 U.S. at 43. And from its earliest days, the right to confrontation has been understood (as that passage from *Crawford* suggests) to apply with special solicitude to out-of-court statements that are *accusatory* in nature. The right, at its core, prohibits criminal prosecutions based on out-of-court accusations.

The Bible twice refers to the right to confrontation, and both times it characterizes it as the right to confront one's "accuser." Most famously, the Book of Acts recites that "[t]he Roman Governor Festus, discussing the proper treatment of his prisoner, Paul, stated: 'It is not the manner of the Romans to deliver any man up to die before the accused has met *his accusers* face to face, and has been given a chance to defend himself against the charges.'" Book of Acts 25:16 (emphasis added), *quoted in Coy v. Iowa*, 487 U.S. 1012, 1015-16 (1988).

In addition, a popular mid-18th century manual for English justices of the peace cited the New Testament's "cast the first stone" parable for the proposition that "no man is to be condemned without an *Accuser*." *See* Michael Dalton, The Country Justice 379 (1746) (emphasis added). In the parable,

the Scribes and Pharisees brought a woman before Jesus, told him that she had been caught in the act of adultery, and asked how she should be punished. After Jesus challenged "him that is among you without sinne" to cast the first stone, the accusers slunk away, and Jesus let the woman go. John 8:7. As commentators later have explained, the 18th century manual "makes sense only if 'accuser' means someone willing to face the accused and make the accusation; it is obvious from the Biblical passage that there were in fact accusers, but they had refused to confront the accused when it became apparent that this would require them to open their own character to impeachment." Charles Allen Wright & Kenneth W. Graham, Federal Practice and Procedure: Evidence § 6342, at 241-422 & n.403 (1997).

This traditional understanding of the right to confrontation as a right, at its core, to confront one's "accuser" was carried forward through the centuries. *See generally* Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause,* 34 Va. J. Int'l L. 481 (1994). When the notorious English treason trials of the 16th and 17th centuries strayed from strictly respecting the right, *see Crawford,* 541 U.S. at 43-45, the defendants complained that the prosecutions denied them the opportunity to confront their "accusers." For instance, Sir Walter Raleigh – whose trial in 1603 the Framers thought was "a paradigmatic confrontation violation," *id.* at 52 – repeatedly demanded to "let my *accuser* come face to face and be deposed[.]" *Trial of Sir Walter Raleigh*, 1 Jardine's Criminal Trials 389, 427 (1832) (emphasis added); *see also id.* at 418 ("But, my Lords, I claim to have my *accuser* brought here face to face to speak.") (emphasis added); *id.* at 420 ("[I]f [Lord Cobham] will then maintain his *accusation* to my face, I will confess myself guilty.") (emphasis added). After England reformed its law during the 17th and 18th centuries to prevent such abuses, it became firmly established at common law that an "accuser" was thought of as "a witness who instigated the

prosecution, and his direct and open participation in the case was indispensable." Leonard W. Levy, Origins of the Fifth Amendment 29 (1968); *see generally Crawford,* 541 U.S. at 44-47.

"Historically," therefore, "the inclusion of the Confrontation Clause in the Bill of Rights reflected the Framers' conviction that the defendant must not be denied the opportunity to challenge *his accusers* in a direct encounter before the trier of fact." *Ohio v. Roberts,* 448 U.S. 56, 78 (Brennan, J., dissenting) (emphasis added). And even well into the latter part of the 20th century, this Court reaffirmed that the Confrontation Clause was meant to ensure that "the accused and *the accuser* engage in an open and even contest in a public trial." *Lee v. Illinois,* 476 U.S. 530, 540 (1986) (emphasis added); *see also California v. Green,* 399 U.S. 149, 179 (1970) (Harlan, J., concurring) ("[T]he Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, *trials by anonymous accusers, and absentee witnesses*") (emphasis added); *Bruton v. United States,* 391 U.S. 123, 138 (1968) (Stewart, J., concurring) (*"[A]n out-of-court accusation* is universally conceded to be constitutionally inadmissible against the accused.") (emphasis added).

The Sixth Amendment, in other words, "constitutionalize[d] the right in an adversary criminal trial to make a defense as we know it." *Faretta v. California,* 422 U.S. 806, 818 (1975). And the Framers understood the right to cross-examine one's accuser as absolutely central to such an adversary process. *Id.*; *see also White v. Illinois,* 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment) (describing the Confrontation Clause's emphasis on "the adversary process"); Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternate History,* 27 Rutgers L.J. 77, 168 (1995) (same). "If [under *Crawford*] we are to imagine the Framers' reaction to practices that did not exist at the time, we could imagine few practices that would

have been more abhorrent to their values" than modern-day victimless prosecutions based on "out-of-court accusations." Robert P. Mosteller, Crawford v. Washington: *Encouraging and Ensuring the Confrontation of Witnesses,* 39 U. Rich. L. Rev. 511, 607 n.548 (2005).

B. During The Period Surrounding The Founding, Accusatory Statements Triggered The Right To Confrontation Even When Made While Still Under The Excitement Of The Alleged Event.

Neither 911 systems nor professional police forces existed in 1791. Nevertheless, victims of alleged crimes during that period had opportunities – and often an obligation – immediately to report felonious acts to local constables or bailiffs. 2 Sir Matthew Hale, Historia Placitorum Coronae: A History of the Pleas of the Crown 98-100 (1st Am. ed. 1847). Such an oral report was commonly called a "hue and cry." *Id.* These prompt reports, like reports to authorities in modern times, were taken very seriously: it was a crime in itself to give "false information" to a constable. 2 Hale, *supra*, at 101; *compare* Wash. Rev. Code § 9A.84.040 (false reports to police unlawful); *State v. Hopkins,* 117 P.3d 377, 384 (Wash. App. 2005) (Quinn-Brintnall, C.J., dissenting) (noting that false report statutes apply to 911 calls).

A hue and cry, also like a 911 call today, typically served a dual function of assisting in apprehending a potentially dangerous suspect and triggering a prospective criminal prosecution. As Sir Matthew Hale explained the situation in common law England:

> 1. The party that levies [the hue and cry] ought to come to the constable of the vill[age], and give him notice of a felony committed, and give him such reasonable assurance thereof as the nature of the case will bear. 2. If he knows the name of him that

> did it, he must tell the constable the same. 3. If he knows it not, but can describe him, he must describe his person, or his habit, or his horse, or such circumstances that he knows, which may conduce to his discovery.

2 Hale, *supra*, at 100; *see also* 2 *id.* at 100 n.(c) (citing other sources in accord); 4 William Blackstone, Commentaries on the Laws of England 294 (1768) ("The party raising [a hue and cry] must acquaint the constable of the vill[age] with all the circumstances which he knows of the felony and the person of the felon."). Constables, in turn, were required to use this information to orchestrate pursuits and arrests of suspects, and sometimes to initiate investigations. 2 Hale, Pleas of the Crown, at 99-100; 4 Blackstone, Commentaries, at 294; *see also* 1 James Stephen, A History of the Criminal Law of England 224 (1883) (recounting case in which a murder victim's butler "fetch[ed]" the local magistrate "just as he was going to bed" to bring him to the crime scene); The Proceedings of the Old Bailey, London 1674 to 1834, *Henrietta Radbourne*, t17870711-1, at 11 (July 11, 1787), <http://www.oldbaileyonline.org/html_units/1780s/t17870711-1.html> (last visited Dec. 19, 2005) (constable's trial testimony describing his preliminary investigation of crime scene).[4]

There can be little doubt that the substance of hues and cries would have been persuasive evidence in criminal prosecutions – and sometimes critical evidence when declarants became unavailable to testify. Yet hues and cries were accusatory statements, made without placing the declarant under oath, conducting thorough examinations, or giving the accused an opportunity to cross-examine. 2 Hale, *supra*, at 101. Accordingly, while people were supposed to give such

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[4] The page references in this brief for the "Old Bailey" proceedings track the pagination that results when the electronic webpages are printed out. The website does not contain official pagination to the original reports.

oral reports and constables were supposed to act on them, neither the English common law nor early American courts allowed any exception to the right to confrontation for using in criminal trials these "fresh" – and often excited – reports in place of the declarant's live testimony subject to cross-examination.

One widely circulated treatise, for example, noted that a constable "could not be asked [at trial] what name [an alleged victim] mentioned" when a robbery victim reported the crime to him. Henry Roscoe, A Digest of the Law of Evidence in Criminal Cases 23 (3rd Am. ed. 1846) (describing *Rex v. Wink*, 172 Eng. Rep. 1293 (1834)). Indeed, it appears that hue and cry reports were not even thought to be a sufficient basis to impose *pretrial* restraints on a suspect's liberty. In order to justify detaining a suspect in prison pending trial, the Marian bail and committal statutes required accusers to give statements under oath and subject to magistrates' questioning. *See Crawford*, 541 U.S. at 44; *Directions to Justices of the Peace*, 84 Eng. Rep. 1055 (1708). When accusers later became unavailable for trial, prosecutors sometimes tried to introduce these examinations (though by the time of the Founding era, such examinations were admissible only if the defendant had been afforded the opportunity to cross-examine). *See Crawford*, 541 U.S. at 46-47. But, aside from the *Wink* case, there does not appear to be any record of a prosecutor even seeking to admit, in place of an accuser's live testimony, an accuser's original hue and cry to a constable or other governmental agent.

Even when a fresh accusation to a governmental agent was not, strictly speaking, a hue and cry, courts precluded its use at trial in the absence of an opportunity for the defendant to confront the declarant. One English trial that occurred almost precisely contemporaneously with the Founding illustrates the point. In *Rex v. Radbourne*, 1 Leach 457 (1787), a constable learned that a woman had been injured and was bleeding

profusely, and he went to her bedroom "to go in to see." *Radbourne, supra,* t17870711-1, at 11. The woman died about three weeks later, and her maid was charged with stabbing and killing her. When the constable testified at trial, he said that, upon entering the room, "I laid myself as close as I could to speak to her" and then "spoke to the lady." *Id.* But before the constable could say anything else, the court interrupted him and noted "[w]e cannot ask you what passed between you and the lady when the prisoner was not there." *Id.* Lest there be any doubt that this ruling rested on confrontation grounds, the court later allowed into evidence a magistrate's deposition of the victim, taken several days after the incident, because the magistrate had placed the victim under oath and conducted his examination "in the presence of the prisoner." *Radbourne,* 1 Leach at 461.

The upshot of this history is that the Framers, following their English forebearers, understood the Confrontation Clause as making a "procedural" choice about how the reliability of evidence "can best be determined" – namely, by cross-examination. *Crawford,* 541 U.S. at 61 (citing 3 Blackstone, Commentaries, at 373 ("This open examination of witnesses . . . is much more conducive to clearing up the truth."); Sir Matthew Hale, History and Analysis of the Common Law of England 258 (1713) (adversarial testing "beats and bolts out the Truth much better")). That being so, using alleged victims' fresh reports in place of live testimony at criminal trials was improper in just the same way as was using more formalized *ex parte* examinations of absent witnesses. South Carolina's highest law court explained shortly after the Bill of Rights was adopted that:

> Charges for criminal offences are most generally made by the party injured, and *under the influence of the excitement incident to the wrong done*, and however much inclined the witness may be to speak the truth, and the magistrate to do his duty in taking

> the examination, his evidence will receive a coloring in proportion to the degree of excitement under which he labors, which the judgement [sic] may detect, but which it is impossible exactly to describe, and we know too how necessary a cross examination is to elicit the whole truth from even a willing witness; and to admit such evidence without the means of applying the ordinary tests, would put in jeopardy the dearest interests of the community.

State v. Hill, 20 S.C.L. 207, 1835 WL 1416, at *2 (App. L. 1835) (emphasis added). Declarants' "excitement" as a result of alleged injuries, in short, in no way exempted their statements reporting crimes to governmental agents from confrontation restrictions. If anything, such excitement was seen as heightening the need for cross-examination.

C. The Hearsay Rule During This Period (And Long Thereafter) Respected The Confrontation Rule That Any Statement Reporting Criminal Conduct Was Inadmissible To Prove The Truth Of The Matter Asserted.

Crawford advised that the operation of the hearsay rule when the Sixth Amendment was adopted also sheds light on the original understanding of the Confrontation Clause. *See* 541 U.S. at 55-56. This is because it is safe to assume that courts at that time would not have countenanced a hearsay exception that permitted testimonial evidence to be introduced in criminal cases. *See id.* at 56.

To this end, *Crawford* also noted that "to the extent the hearsay exception for spontaneous declarations existed at all [in 1791], it required that the statements be made 'immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage.'" *Id.* at 58 n.8 (quoting *Thompson v. Trevanion*, Skin. 402, 90

Eng. Rep. 179 (K.B. 1694)). A thorough examination of common-law sources demonstrates that this suggestion is generally correct; if anything, it makes the rule respecting "spontaneous" statements in criminal cases sound more lenient than it was. The rule around the time of the Founding provided that a spontaneous declaration might be admissible in a criminal case if it was part of the *res gestae* – that is, an inseparable part of the event itself. But, save "[t]he one deviation" of dying declarations, *Crawford*, 541 U.S. at 55 n.6, statements describing completed criminal acts – *even to private parties* – were considered inadmissible hearsay if the declarant did not testify at trial. Furthermore, this rule against admitting statements reporting crimes remained firm for decades after the Sixth Amendment was enacted. It thus powerfully suggests that American lawyers and courts originally conceived the right to confrontation as precluding the admission of such accusatory evidence as a substitute for live trial testimony in an adversarial setting. *See, e.g., Printz v. United States*, 521 U.S. 898, 905 (1997) (government's failure to use a "highly attractive" practice for years following the Founding gives "reason to believe" the practice was considered unconstitutional).

1. Prior to the Founding, not a single criminal procedure or evidence treatise suggested that out-of-court statements describing criminal conduct were admissible, no matter how contemporaneously made with the event described. *See, e.g.*, Thomas Peake, A Compendium on the Law of Evidence 8 (1801) (listing hearsay exceptions and not mentioning anything related to spontaneous declarations). In the early 19th century, however, English and American treatises began to divide statements that were "part of the *res gestae*," in which a statement "is itself a fact," from those that were "mere oral assertion[s]." 3 William Blackstone, Commentaries on the Laws of England 368 n.25 (J. Chitty ed. 1826); *see also* 2 Joseph Gabbett, A Treatise on Criminal Law 468 (1843) (statement admissible if it was "itself a part of the transaction" but not if it is offered to prove "a *distinct* fact"). As another

treatise put it: contemporaneous declarations "respecting the motives or objects he had in view of doing" the act were admissible, but assertions "made prior or subsequent to the doing the acts" were not. Eustachius Strickland, A Treatise on Evidence 397 (1830).

Well into the 19th century, courts rigorously enforced the requirement that a statement was admissible only if it was part of, rather than a description of, an event. In a typical case, a man was shot in his home. A few minutes later, family members and friends responded to help him. He told them to "[g]o for a doctor," and then, in response to someone's question, identified the shooter. The Indiana Supreme Court held that the latter statements constituted "no part of the *res gestae*, and were not admissible as such," explaining:

> It can not, with any propriety, be said, that the statements made by the deceased, after the crime had been fully completed, that Prince Jones shot him, served in any degree to illustrate the character of the main fact, the shooting. They were the simple statements of the deceased, narrative of what had already transpired, and important only as indicating the person by whom the main fact had been perpetrated.
>
> . . . .
>
> We attach no special significance to the fact that the declarations were made, not contemporaneously with, but a few minutes after, the shooting, further than that it shows, in connection with the substance of the statements, that they were purely narrative of what had already transpired.

Jones v. State, 71 Ind. 66, 82-83 (1880). A statement, in sum, saying, "Prince Jones, don't shoot me!" may have been

admissible, but telling a third party that "Prince Jones just shot me" was not.

Numerous other homicide and similar cases reached analogous results, making clear that it was irrelevant whether an accusatory statement "was made so soon after the occurrence as to exclude the presumption that it has been fabricated" or whether "it was made under such circumstances as to compel the conviction of its truth." *Mayes v. State,* 1 So. 733, 735 (Miss. 1877); *see also, e.g., State v. Carlton,* 48 Vt. 636, 643 (1876) (irrelevant whether statement was made "so soon after that the party had not time, probably, to imagine or concoct a false account"). Nor did it matter whether a victim's statement was made moments after an incident "with a view to the apprehension of the offender." *People v. Ah Lee,* 60 Cal. 85, 92 (1882); *see also, e.g., State v. Davidson,* 30 Vt. 377 (1858) (statement suggesting need to pursue suspect inadmissible). If a victim's statement identified the perpetrator of a "completed" criminal act, the statement, "however nearly contemporaneous with the occurrence," fell outside the *res gestae* and was strictly inadmissible. *Davidson,* 30 Vt. at 384-85 (robbery victim's statement identifying perpetrator "directly after" attack inadmissible); *see also Mayes,* 1 So. at 735-36 (victim's statement identifying assailant right after being stabbed); *State v. Pomeroy,* 25 Kan. 349, 350-51 (1881) (statement three to five minutes after assault identifying attacker to persons who responded to his cry for help); *Ah Lee,* 60 Cal. at 89-91 (stabbing victim's statement minutes after event identifying attacker); *Kraner v. State,* 61 Miss. 158, 161 (1883) (bleeding victim's statement five minutes after stabbing and after "the accused had withdrawn from the scene"); *State v. Estoup,* 39 La. Ann. 219, 221 (La. 1887) (shooting victim's statement "a few minutes after receiving the wound").

Only one state court prior to the late 19th century issued a contrary decision, allowing the admission of a deceased victim's statement shortly after being stabbed as part of the *res*

gestae. *See Commonwealth v. McPike*, 3 Cush. 181 (Mass. 1849); *see also Commonwealth v. Hackett*, 2 Allen 136 (Mass. 1861) (applying *McPike* to another such case). But the ruling was roundly criticized as without legal or logical foundation. *See* 1 Francis Wharton, A Treatise on the Law of Evidence in Criminal Issues § 262, at 503 & n.14 (10th ed. 1912) (stating that *McPike* "cannot be sustained" and that "[t]he better rule is that when the transaction is over, no matter how short may have been in the interval, and the assailant is absent, declarations by the assailed . . . are not part of the *res gestae*"); *Binns v. State*, 57 Ind. 46, 51 (1877) (same and refusing to follow *McPike*); *Mayes*, 1 So. at 734-35 (same); *Ah Lee*, 60 Cal. at 88-92 (same).[5]

There is little doubt that the *res gestae* doctrine, as reflected in these cases, was shaped by a desire to protect the right to confrontation. Early 19th century treatises explained that "[t]he principle of th[e] rule" rejecting all "hearsay reports of transactions given by persons not produced as witnesses is that such evidence requires credit to be given to a statement made by a person *who is not subject to the ordinary tests* enjoined by law for ascertaining the correctness and completeness of his testimony" – namely, to "oath" and "cross-

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[5] A lone English criminal case also suggested that a statement describing a recently completed incident might be admissible, *see Rex v. Foster*, 6 Car. & P. 325 (1834), but it, too, met with a strong rebuke. *See, e.g.*, 1 Horace Smith, Roscoe's Digest of the Law of Evidence in Criminal Cases 28 (8th Am. ed. 1888) (broad reading of decision is "difficult to reconcile with established principles"). In a subsequent English case, a court made clear that the *res gestae* rule remained strict. There, a victim, no more than one or two minutes after having her throat cut, exclaimed to her aunt (who was just outside the house), "See what Harry has done!" The court ruled the declaration inadmissible. The court explained that "[a]nything uttered by the [victim] at the time the act was being done would be admissible, as, for instance, if she had been heard to say something, as 'Don't, Harry!' But here it was something stated by her after it was all over, whatever it was, and after the act was completed." *Regina v. Bedingfield*, 14 Cox Crim. Cas. 341, 342-45 (Crown Ct. 1879).

examination." 3 Simon Greenleaf, A Treatise on the Law of Evidence §124, at 148 (1842); *see also* 3 William Oldnall Russell, Treatise on Crimes and Misdemeanors 246 (9th ed. 1877) ("the reason of the rule is, that evidence [against the accused] ought to be given under the sanction of oath, and that the person who is to be affected by the evidence may have an opportunity of interrogating the witness as to his means of knowledge, and concerning the particulars of his statement"); 1 Leonard MacNally, The Rules of Evidence on Pleas of the Crown 360 (1811) (hearsay is inadmissible at trials because "such evidence is not upon oath: and also because the party, who would be affected by such evidence, had no opportunity for cross-examination").

In a case holding inadmissible a manslaughter victim's statement identifying the alleged perpetrator moments after being shot, the Vermont Supreme Court made explicit what was implicit in the treatises and in many other opinions of the time:

> The wisdom and justice of this rule in the administration of criminal law must be apparent. The general rule is, that no evidence can be received against the prisoner except such as is taken in his presence. . . . [To] admit the declarations of the party injured, made in the absence of the party accused, and without the right of cross examination, at a period of time so far subsequent to the happening of the act or transaction about which the declarations are made that the party might have invented them, would be depriving the accused of one of the most important safeguards the law has given him for his protection.

Carlton, 48 Vt. at 643-44; *accord Harris v. State*, 1 Tex. Ct. App. 74, 80-81 (1876). True *res gestae* statements, in short, may have been exempt from confrontation requirements, *see*

People v. Simonds, 19 Cal. 275, 278 (1861), but courts were loathe to go any further.

The only recognized exception (aside from dying declarations) to the prohibition against admitting declarations outside of the *res gestae* actually proved the rule that introducing any declaration accusing someone of committing a criminal act implicated the right to confrontation. In cases in which "a person ha[d] in been any way outraged" – most often in rape cases, but also in other cases lacking any sexual component – "the fact that this person made a complaint" right after it happened was admissible. 1 Horace Smith, Roscoe's Digest of the Law of Evidence in Criminal Cases 28 (8th Am. ed. 1888); *see also* 3 Russell, *supra*, at 248-49. Sometimes courts admitted only the fact that the alleged victim complained, and sometimes courts admitted the substance of such complaints to corroborate the victim's trial testimony. *See Rex v. Clarke*, 171 Eng. Rep. 633 (1817) (only fact of complaint admissible); *Regina v. Walker*, 174 Eng. Rep. 266 (1839) (same); *Regina v. Osborne*, 174 Eng. Rep. 622 (1842) (same); 3 Greenleaf, *supra*, at § 213 (corroboration permissible); 3 Russell, *supra*, at 249 (same).

At the same time, it was settled that "*if the victim did not testify*, evidence of the [fresh] complaint" – even to a relative or friend – "was *not* admissible, and only the fact that a complaint was made could be admitted." 2 *McCormick on Evidence* § 272.1, at 223 (4th ed. 1992) (emphasis added); 3 Russell, *supra*, at 249 (same); 3 Greenleaf, *supra*, at § 213 ("The complaint constitutes no part of the *res gestae* . . . and where she is not a witness in the case, it is wholly inadmissible."); Roscoe, *supra*, at 23 (same). Thus, for instance, the King's Bench in 1779 held that an alleged victim's complaint made to her mother "immediately upon coming home" from an alleged assault was inadmissible because the victim was "not sworn or produced as a witness on the trial." *King v. Brasier*, 1 Leach 199, 200 (K.B. 1779). Nearly a century later, an

American court held that an alleged victim's statements that were "elicited . . . by her parents soon after" an alleged assault with intent to commit rape were inadmissible because the declarant did not testify and the statements were "not [made] in the presence of the accused." *Weldon v. State*, 32 Ind. 81, 82 (1869). It is hard to miss the confrontation rhetoric in these decisions. Other decisions also adhered to this restriction on introducing absent victims' fresh complaints, even as they gradually discarded the supposition that victims of certain violent acts typically would complain right after they happened.[6]

2. In light of this history, *Thompson v. Trevanion*'s statement that a woman's declaration "immediat[ely] upon the hurt received" was admissible, 90 Eng. Rep. at 179, shows, if anything, that the Framers would not have exempted a 911 call reporting a crime from the Confrontation Clause. It must be noted, for starters, that English common-law cases illuminate the scope of the right to confrontation only when they admitted or rejected statements offered "against the accused in a *criminal* case." *Crawford*, 541 U.S. at 56 (emphasis in original). *Thompson*, however, as its caption indicates, was a *civil* case – an "action of trespass of assault, battery, and wounding." 90 Eng. Rep. at 179. The judge had no occasion to consider whether the statement at issue would have been admissible against a *criminal* defendant.

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[6] *See Regina v. Guttridges*, 173 Eng. Rep. 916 (1840) (fresh complaint to friend inadmissible because witness was not available to testify); *Regina v. Megson*, 173 Eng. Rep. 894 (1840) (complaint "as soon as [alleged victim] returned home" inadmissible "to show who committed the offence" because she did not testify at trial); *People v. McGee*, 1 Denio 19, 22-24 (N.Y. 1845) (reversing conviction because alleged victim's complaint to housekeeper "immediately after the offense is supposed to have been perpetrated" was improperly admitted in light of fact alleged victim did not testify at trial); *Hornbeck v. State*, 35 Ohio St. 277, 280-81 (1879) (reversing conviction because alleged victim's fresh complaint was introduced without her testifying at trial); *Elmer v. State*, 20 Ariz. 170 (1919) (same).

Furthermore, many Founding-era commentators assumed that the case's four-sentence *nisi prius* report did not intend to suggest that the declarant's statement was admitted to prove that the defendant injured her. One treatise assumed that the declarant's statement simply described her injury and was not accusatory. *See* 3 Russell, *supra,* at 248 & n.1. Another believed that the statement was admitted solely to show she complained but not to prove how it happened. *See* 1 Thomas Starkie, A Practical Treatise on the Law of Evidence, pt. II, § 30, at 149 (1826). Still another assumed that the declarant testified at trial, so that her out-of-court statement was nothing more than corroborative evidence. *See* Geoffrey Gilbert, The Law of Evidence 108 (1754). *See generally Insurance Co. v. Mosley,* 75 U.S. (8 Wall.) 397, 418 (1869) (Clifford, J., dissenting) (*Thompson* is "so imperfectly reported that [it] can hardly be said to be reliable").

But to the extent *Thompson* might nevertheless be thought relevant and to have admitted the declarant's statement in the absence of her testifying to prove how she was injured, the reporter's phrase "immediat[ely] upon the hurt received," 90 Eng. Rep. at 179, is most naturally read to mean that the statement – in contrast to the one here reporting an incident to a third party – was made so simultaneously with being injured that it was part of the *res gestae. See, e.g.,* A Universal Etymological English Dictionary (1783) (defining "immediate" as "[w]hich follows without any thing coming between; that follows or happens presently; that acts without means"); Complete and Universal English Dictionary (1792) ("In such a state with respect to something else, as to have nothing in between; without any thing intervening; not acting by second causes. Instant, or present, as applied to time."). To the extent that advocates and commentators later sometimes suggested that the judge in *Thompson* admitted an absent witness's declaration describing a truly completed act for the truth of the matter asserted, authorities as late as the 1880's believed that following this interpretation of *Thompson* in a criminal case

would have been "difficult to reconcile with established principles." Smith, *supra*, at 28; *see also Mayes*, 1 So. at 734 (refusing to follow this interpretation); *Ah Lee*, 60 Cal. at 89 (same).

It is true that, during the latter part of the 19th century, this Court in a civil case, and then even some state courts in criminal cases, began to "extend" the scope of the *res gestae* doctrine to cover statements made "*almost* contemporaneously with [an injury's] occurrence." *Mosley*, 75 U.S. (8 Wall.) at 408 (emphasis added); *see also Territory v. Callaghan*, 6 P. 49, 54-55 (Utah 1885) (statement a few seconds after shooting); *State v. Robinson*, 27 So. 129, 130-31 (La. 1900) (statement thirty seconds after shooting). But these later-emerging decisions cannot be taken as evidence that the Framers would have believed *the Confrontation Clause* permitted an alleged victim's statement reporting a recently completed crime. The decisions post-date the Founding by roughly a century. Furthermore, the Confrontation Clause does not apply in civil trials, and it did not then apply in state criminal prosecutions.

Most important, these decisions extending the scope of the *res gestae* doctrine rested on the supposition that "[i]n the ordinary concerns of life, no one would doubt the truth of th[e] declarations" made shortly after disruptive events. *Mosley*, 75 U.S. (8 Wall.) at 408; *accord Callaghan*, 6 P. 49, 54 ("No time had elapsed for the fabrication of a story."); *Robinson*, 27 So. at 130 (no opportunity for "fabrication"). While the perceived reliability of untested out-of-court statements afforded a legitimate theoretical basis in cases beyond the reach of the Sixth Amendment to expand the *res gestae* doctrine, "[a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right to confrontation." *Crawford*, 541 U.S. at 61. In particular, the Framers believed that when the government seeks to introduce testimonial evidence in a criminal case, "the only indicium of reliability sufficient to satisfy constitutional demands is the one the

Constitution actually prescribes: confrontation." *Id.* at 68-69. The overwhelming body of criminal jurisprudence for roughly 100 years after the Founding thus, quite properly, treated statements reporting completed criminal acts as testimonial evidence, regardless of any perceived reliability. *See, e.g., Mayes,* 1 So. at 735; *Carlton,* 48 Vt. at 643.

3. By the same token – and contrary to the Washington Supreme Court's suggestion, J.A. 125 – it is of no moment that McCottry's answers to the 911 operator's questions in this case qualified as "excited utterances" under current Washington evidence law. Washington courts openly have acknowledged that the State's modern excited utterance rule "is not as restrictive as the requirements of the common law [*res gestae*] exception." *State v. Dixon,* 684 P.2d 725, 728 (Wash. App. 1984). And *Crawford* made clear that statements bearing testimonial attributes that, at the same time, "happen to fall within some broad, modern hearsay exception" still implicate the Confrontation Clause, "even if that exception might be justifiable in other circumstances." 541 U.S. at 56 n.7. That is precisely the case with the excited utterance exception.

The "excited utterance" exception did not really exist until 1904. That was when Dean Wigmore, r eviewing the spattering of cases such as *Mosley* from late 1800's, realized that these cases could not really be explained by the common-law *res gestae* doctrine. 3 John Henry Wigmore, A Treatise on the System of Evidence in Trials at Common Law §§ 1745-47, at 2247-50 & § 1796, at 2320. But instead of rejecting these cases as strays, Wigmore claimed they were comparable to *Thompson* and he advanced, for the first time, the notion that the "stress of nervous excitement . . . stills the reflective facilities" and renders statements under that condition "particularly trustworthy," thereby warranting exemption from the hearsay rule. 3 *id.* § 1747, at 2250; *see also* Friedman & McCormack, 150 U. Pa. L. Rev. at 1217-22 (describing Wigmore's role in creating this hearsay exception and

referencing authority explaining that Wigmore's psychological presumptions are open to serious question). Equally important, Wigmore did not distinguish between civil and criminal cases in advancing this new reliability-based theory.

Wigmore openly acknowledged that, in contrast to classic *res gestae* statements, narrative statements describing actions that had just completed were "testimonial," as he used that term. 3 Wigmore, *supra*, § 1746, at 2248-49; *see also id.* § 1796, at 2320 ("what [courts] do in this instance is to admit extrajudicial assertions *as testimony* to the fact asserted") (emphasis added).[7] But even when such statements reported criminal acts to governmental agents, Wigmore did not perceive this as posing Confrontation Clause concerns in ensuing criminal prosecutions. He thought the Clause did "not prescribe what kinds of testimonial statements . . . shall be given infrajudicially – this depend[ed]," in his view,

---

[7] Wigmore further explained:

> Whenever, therefore, an [excited] utterance is used as testimony that the fact asserted in it did occur as asserted, *i.e.*, on the credit of the speaker as a credible person, it is being used testimonially, and is within the [general] prohibition of the Hearsay rule.
>
> Now this testimonial use is precisely the use that is made of the present class of statements. . . . [T]hey clearly do involve the testimonial use of the assertion to prove the truth of the fact asserted, – for example, *when the injured person declares who assaulted him* or whether the locomotive bell was rung, or when the bystander at an affray exclaims that the defendant shot first. Such statements are genuine instances of using a hearsay assertion testimonially; *i.e.*, we believe that Doe shot the pistol, or that the bell was rung, *because* the declarant so asserts – which is essentially the feature of all human testimony.

3 Wigmore, *supra*, at §1746, at 2249 (first emphasis added).

exclusively "on the law of evidence for the time being." 2 *id.* § 1397, at 1755. Wigmore's perspective, in other words, gave states open field running to create expansive excited utterance exceptions for use in prosecuting criminal cases. And many states took it.[8]

Crawford, however, expressly rejected Wigmore's constitutional view. 541 U.S. at 50-51, 67-68. *Crawford* held that the Confrontation Clause does not depend on "the vagaries of the rules of evidence, much less [on] amorphous notions of 'reliability.'" *Id.* at 61. Instead, it demands of *all* testimonial statements "what the common law required." *Id.* at 68.

The common law, in criminal cases, precluded courts from admitting a victim's description of a completed criminal act to a governmental agent in the absence of the government proving unavailability and that there was a prior opportunity to cross-examine. Consequently, so does the Confrontation Clause today.

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[8] In recent years, Washington and other states aggressively exploited this opening that Wigmore – and, in a slightly different way, the *Roberts* framework – gave them. Washington courts have held that alleged victims' statements made several hours after upsetting incidents can constitute excited utterances, even if made in response to governmental agents' questions. *See State v. Thomas*, 83 P.3d 970, 987 (Wash. 2004) (collecting examples); *State v. Williamson*, 996 P.2d 1097, 1102-03 (Wash. App. 2000) (victim's statements at police station after being promised suspect would be arrested constituted excited utterances); *State v. Morrison*, 1999 WL 429806 (Wash. App. 1999) (unpublished opinion) (statements in interview with police officer four to five hours after incident were excited utterances). Many other states in modern times have developed similarly broad excited utterance rules. *See, e.g., Spence v. State*, 162 S.W.3d 877, 881 (Tex. App. 2005) ("Texas courts have held that a declarant's state of excitement can last long after the initial crime and that excited utterances can be made both spontaneously or in response to questioning."); *People v. Brown*, 517 N.E.2d 515, 517-522 (N.Y. 1987) (same in New York and other jurisdictions). Not all states, however, have taken this approach; at least one has carefully cabined its excited utterance exception to avoid treading on confrontation concerns. *See State v. Branch*, 865 A.2d 673 (N.J. 2005).

II. There Is No Reason In The Context Of 911 Calls To Depart From The Traditional Rule That Accusatory Statements Made To Governmental Agents Implicate The Confrontation Clause.

To the extent that the text of the Sixth Amendment and the historical record do not alone resolve this case, a straightforward application of *Crawford* confirms that a modern-day statement reporting a criminal act to a governmental agent – just like such a report during the Founding era – is subject to the Confrontation Clause. That means that a statement, as here, that an alleged victim makes to a 911 operator accusing someone of just having committed a crime is testimonial.

A. Prosecuting A Case Using A 911 Call That Reports A Crime, Instead Of The Accuser's Live Testimony, Unacceptably Undermines The Adversarial Process.

Crawford's testimonial principle re-installs the Confrontation Clause's fundamental commitment, as Justice Thomas put it years earlier, to the "adversary process." *White*, 502 U.S. at 365 (Thomas, J., concurring in part and concurring in the judgment); *see also Crawford*, 541 U.S. at 42-52. It requires that the Clause be interpreted at all times with its original focus in mind – namely, prohibiting the use of "[out-of-court accusations," *Bruton*, 391 U.S. at 138 (Stewart, J., concurring), or "*ex parte* examinations as evidence against the accused." *Crawford*, 541 U.S. at 50. Accordingly, this Court held in *Crawford* that "[w]hatever else the [testimonial principle] covers, it applies at a minimum to prior testimony . . . and to police interrogations" – that is, to "recorded statement[s] knowingly given in response to structured police questioning." *Id.* at 53 n.4, 68. This Court also noted that the accusatory "spontaneous declarations" the victim made to the responding officer in *White*, some forty-five minutes after the sexual assault at issue, were "testimonial." *Id.* at 58 n.8.

The practice of trying a defendant based on answers an alleged victim gives to a 911 operator's questions likewise is antithetical to the adversarial process the testimonial principle is designed to protect. The 911 service provider in this case describes its interactions with alleged victims as "police incident interviews," J.A. 112, and rightfully so: Operators, as agents of the State, carry out such interviews not only for the purpose of facilitating responses to any needs for assistance but also to begin gathering information that may be useful in the police's investigating and the State's prosecuting criminal cases. That is at least partly why 911 systems record their interviews. That is also why the 911 system here, as elsewhere, uses "a uniform method of interviewing callers requesting police assistance." J.A. 112; *see also, e.g., People v. Cortes*, 781 N.Y.S.2d 401, 406 (N.Y. Sup. Ct. 2004). This policy requires operators to ask numerous detailed questions – such as "[w]hat circumstances led to the incident?" and "what is the suspect's date of birth?" – that have as much or more to do with gathering evidence for potential investigations and prosecutions as they do with attempting to resolve any existing public safety problem. J.A. 113-16.

The operator here "followed [the scripted guidelines] almost exactly." J.A. 135 n.5 (Sanders, J., dissenting). She elicited, through five separate questions, what the Washington Supreme Court called "*the information essential to the prosecution of this case*[,] McCottry's initial identification of Davis as her assailant." J.A. 128 (emphasis added); *see also* J.A. 9 (transcript of questioning).

When a governmental agent engages in such "structured" preliminary inquiries with an eye toward potential law enforcement action, the Confrontation Clause's traditional concerns respecting the inadequacies of *ex parte* examinations come squarely into play. *Crawford*, 541 U.S. at 53 n.4; *see also Lilly v. Virginia*, 527 U.S. 116, 137 (1999) (plurality opinion) ("When the government is involved in the statements'

production and when the statements describe past events," the statements "implicate the core concerns of the old *ex parte* affidavit practice."). It makes no matter whether such preliminary *ex parte* dialogue takes place (as at common law) at a constable's house or (nowadays, with the assistance of modern technology) immediately over the phone. Indeed, the capacity in modern times to record these phone conversations on a tape or disk actually heightens the threat to the adversarial process. It enabled the prosecutor here, upon playing the 911 tape for the jury, to say that proof that McCottry was assaulted was "right here in her voice," J.A. 81, lending a nearness to her out-of-court declarations – and a resemblance to in-court testimony – that would be absent if a third person had simply recounted the police incident interview on the witness stand.

What is more, just as in *Crawford,* the transcript of the recorded statements here reveals several assumptions concerning the defendant's guilt "that cross-examination might well have undermined." 541 U.S. at 66. McCottry stated at one point that another man had been present in the house, J.A. 10, and she later told the police she had been involved an argument with this man preceding the alleged assault. J.A. 136 n.7 (Sanders, J., dissenting). But the operator never pursued whether this man might have been the one who actually assaulted her. (Nor did the police; they never even sought to learn his last name. *Id.*; *see also* Report of Proceedings (Sept. 4, 2001), at 18, 23-24). At another point, a child came on the phone call and said "Hi Daddy," thus assuming it was Davis who was on the other end of the line. J.A. 11. Again, the operator never followed up to ask why McCottry's child would have thought that a man who supposedly had just left the house after assaulting his mother was on the phone with her.

Whatever the outer boundaries of the testimonial principle may be, this type of one-sided dialogue is more than sufficient to trigger confrontation concerns. To hold otherwise would be to say that the government may establish a system for

reporting crimes to the police and for conducting *ex parte* interviews of complainants, and then use recordings of those "police incident interviews," as a substitute for live testimony at trial, to prosecute defendants. The government could proceed in this manner even when the complainants are perfectly available for trial. *See Crawford,* 541 U.S. at 68 (no unavailability requirement for nontestimonial hearsay); *White,* 502 U.S. at 355-58 (Confrontation Clause imposes no unavailability requirement for introducing excited utterances); Fed. R. Evid. 803(2) (unavailability not required under excited utterance exception); Wash. R. Evid. 803(a)(2) (same). If modern prosecutors could try and convict defendants based solely on such "excited utterance" interviews, the right to confrontation would be disabled from serving its fundamental objective: requiring accusations of criminal conduct to be leveled in court proceedings, subject to adversarial testing.

This is especially so in the context of domestic violence reports like the one here. Washington's Domestic Violence Prevention Act, enacted in 1984, *requires* the police to arrest anyone that they have probable cause to believe has "violated a protection order" or who recently has committed "a domestic violence crime." *City of Tacoma v. State,* 117 Wn.2d 348, 352 (1991); *see* Wash. Rev. Code § 26.50.110(2) (protection order violation); Wash. Rev. Code § 10.31.100(2) (domestic violence). Lest these laws go unnoticed, the websites that the Washington court system and King County (where this case arises) maintain regarding domestic violence publicize these procedures to would-be complainants.[9] Consequently,

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[9] *See* Washington Courts, *Domestic Violence Protection Order Process, Violation of Protection Orders, What You Should Do If the Order is Violated,* <http://www.courts.wa.gov/dv/?fa=dv_order.ordviol> (last visited Dec. 21, 2005) ("When you believe a violation of the terms of the protection order has occurred, you should call 911 or your local police to request an officer for any needed emergency assistance and to take a report of the violation." Violating a protection order is a crime that "subjects the Respondent to a MANDATORY ARREST."); King County, *Information*

"[p]eople know now that if they call 911 and report domestic violence there will probably be an arrest. Indeed, 'under mandatory arrest laws, a battered woman's call to the police is tantamount to a request for arrest.'" Friedman & McCormack, 150 U. Pa. L. Rev. at 1196 (quoting *Developments in the Law – Legal Responses to Domestic Violence,* 106 Harv. L. Rev. 1498, 1538 (1993)). Certainly Michele McCottry was reasonably on notice that her call would trigger such action; she told the operator she had a protection order against Davis and that the police had responded to another domestic disturbance at her house only two days earlier. J.A. 12, 21; *see also* J.A. 134 (Sanders J., dissenting) (McCottry was on notice regarding "the criminal penalties for violating the [protection] order"); J.A. 3 (actual protection order). To say that McCottry was not Davis' accuser – or, as the Sixth Amendment says, a "witness against" him – would be to drain the concept of any meaning.

B. That People Sometimes Call 911 At Least In Part To Seek Help Does Not Render The Accusatory Statements Here Nontestimonial.

Notwithstanding the abundant indicators that the right to confrontation should have applied here, the Washington Supreme Court held that McCottry's accusation to the 911 operator was not testimonial because McCottry supposedly called 911 "because of an immediate danger" rather than to

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About the Law Against Domestic Violence and About Courts and the Protection Order Process, <http://www.metrokc.gov/dvinfo/dv6_0.htm> (last visited Dec. 21, 2005) ("Once you have a valid Order for Protection, if it is violated, you should call 9-1-1 and ask the police to help you by enforcing it."); King County, *If You Think You Are or Might Be a Victim of Domestic Violence*, < http://www.metrokc.gov/dvinfo/dv1_0.htm> (last visited Dec. 21, 2005) ("If the police believe they have probable cause to suspect that a person assaulted you within the previous four-hour period, they are required to arrest the person who committed the assault. That is the law.").

"'bear witness' in contemplation of legal proceedings." J.A. 128. This analysis is wrong on the law and wrong on the facts.

1. As a legal matter, any subjective purpose that McCottry may have had in calling 911 is irrelevant here. There is no historical or modern justification for assessing a declarant's subjective state of mind to determine whether her statement accusing someone of committing a crime is testimonial. Hues and cries to 18th century English and American constables were inadmissible regardless of the accuser's subjective intent. *See supra* at 18-21. The same was true with respect to victims' exclamations in the 19th century that someone had just shot or stabbed them. Even though such victims were seriously injured and many may not have been trying to "bear witness," the only question relevant to courts was a functional one: whether the declarant was describing a completed criminal act. *See supra* at 24-29.

What is more, the Washington Supreme Court's rule dividing 911 statements seeking help from danger from those seeking to "'bear witness' in contemplation of legal proceedings," J.A. 128; *see also id.* at 124, sets up a demonstrably false dichotomy. The truth is that almost all 911 calls contain an element of each. Even if the typical caller wants some kind of help, she also probably realizes she is making statements that might reasonably serve prosecutorial purposes. Pretending, as the Washington Supreme Court did, that the spectrum of 911 calls – and the spectrum of statements within such calls – can be neatly divided between those that seek to get help and those that seek to create evidence triggering prosecutorial action invites judicial manipulation and idiosyncratic decision making – the very problems that plagued the *Roberts* framework. *See Crawford*, 541 U.S. at 62-63; *People v. Walker*, 697 N.W.2d 159, 170 (Mich. App. 2005) (Cooper, J., dissenting) ("Determining whether a statement is testimonial in nature based on the declarant's state of mind is

as amorphous as the reliability test of *Ohio v. Roberts*"; indeed, "it is merely a reliability analysis in disguise.").

To the extent that historical traditions and inferences do not resolve whether a type of statement is testimonial and it thus becomes necessary to look to a more general standard, a court should inquire whether a *reasonable declarant* would have *anticipated* that her statement might be used for law enforcement purposes. In countless areas of constitutional criminal procedure, this Court shuns subjective inquiries in favor of objective standards. *See, e.g., Berkemer v. McCarty,* 468 U.S. 420, 430-31, 442 & n.35 (1984) ("in custody" requirement for Fifth Amendment's *Miranda* rule); *Rhode Island v. Innis,* 446 U.S. 291 (1980) ("interrogation" standard for Fifth Amendment's *Miranda* rule); *Florida v. Bostick,* 501 U.S. 429, 437 (1991) ("seizure" standard under Fourth Amendment). The reasons for favoring objective standards – efficiency, certainty, and consistency – apply, if anything, with more force here. The very reason confrontation issues arise in the first place is because certain witnesses are not present to testify. The idea, therefore, that courts should estimate those witnesses' "perception[s] of [their] situation[s]" at the time they gave their out-of-court statements ignores a fundamental teaching of *Crawford* – that "[o]nly cross-examination could reveal [those perceptions]." *Crawford,* 541 U.S. at 66.

Furthermore, focusing on whether a reasonable person – had she stopped to consider the matter – would have realized she was making a statement that might be used prosecutorially adheres to the Framers' intention of preserving the adversarial process. This test triggers the Confrontation Clause when an out-of-court statement, if later used at trial, would operate as the functional equivalent of *ex parte* prosecutorial testimony. It likewise corresponds to the Fifth Amendment rule that persons act as "witness[es]," against themselves, U.S. Const. amend. V – and thus give "testimonial" evidence – when they make "disclosures" that they "reasonably believe[] could be

used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar v. United States,* 406 U.S. 441, 445 (1972); *see also Doe v. United States,* 487 U.S. 201, 210-11 (1988) (further refining "testimonial" concept in Fifth Amendment context). And while this test appropriately excludes "a casual remark to an acquaintance," *Crawford,* 541 U.S. at 51, or a statement in furtherance of a conspiracy "made unwittingly to an [FBI] informant," *id.* at 58 (citing *Bourjaily v. United States,* 483 U.S. 171, 181-84 (1987)), it unquestionably includes McCottry's statement here.

2. To be sure, people sometimes call 911 and do nothing more than ask for help. When a caller does so, that part of a call may not be testimonial. Similarly, a court might legitimately allow the government in prosecuting a crime to introduce the plain *fact* that an alleged victim called 911 shortly after the alleged incident. But if the caller does not testify at trial, the fact that the alleged victim made a call is the most that should be admissible; portions of 911 calls reporting crimes and identifying alleged perpetrators are testimonial and cannot be used in place of the accuser's live trial testimony.

The 911 police incident interview here plainly falls on the testimonial side of this framework. Instead of starting the call with a plea for urgent safety measures, McCottry responded from the beginning to a series of questions posed by the operator (giving, for starters, Davis' last, then first, and then middle name), and she later expressly stated that she did *not* need an "aid car." J.A. 10. Indeed, upon learning that McCottry was not asking for help, the operator nevertheless pressed on and insisted that McCottry "stop talking and answer my questions." *Id.* Finally, McCottry's statements "describe[d] past events," *Lilly,* 527 U.S. at 137 (plurality opinion); her alleged attacker "had left the residence moments" before she spoke to the 911 operator. J.A. 117.

Any lingering doubt concerning whether the 911 police incident interview here was testimonial is eliminated by the prosecutor's own characterization of the interview upon playing the tape recording for the jury. The prosecutor asserted that "although [the accuser] is not here today to talk to you she left you something better. She left you *her testimony* on the day that this happened . . . this shows that the defendant, Adrian Davis was at her home and assaulted her." J.A. 81 (emphasis added). This forthright description of the way that this 911 interview was used in this case – made before the *Crawford* decision created an incentive for the State to downplay the testimonial nature of out-of-court statements – obviously is accurate. The State did not use McCottry's statements to argue that she called for help; it used them as substantive evidence to prove element by element that Davis assaulted her. J.A. at 68-70, 81-82. Consequently, the State's introduction of the 911 call violated the Confrontation Clause.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Washington Supreme Court.

Respectfully submitted,

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ADRIAN MARTELL DAVIS,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

On Writ of Certiorari to the Supreme Court of Washington

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QUESTION PRESENTED

Whether statements to a 911 operator reporting an emergent situation are "testimonial" statements under *Crawford v. Washington*, 541 U.S. 36 (2004).

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STATEMENT OF THE CASE

1. On February 6, 2001, at 11:54 a.m., a telephone call arrived at the Valley Communications Center in Kent, Washington.[1] The operator answering the call was greeted with a dial tone; she immediately reversed the call, and the telephone rang at the apartment of Michelle McCottry. Tr. 4:76-77; J.A. 8-13 (911 transcript).

Ms. McCottry answered, but before speaking into the receiver, she shouted to someone in the apartment. It is not possible to discern from the tape what she said. Her breathing was audible and heavy as the operator asked her what was going on. Over a period of about four minutes, including an interruption when Ms. McCottry left the telephone to close and lock her door, the operator determined the basic events leading up to Ms. McCottry's panicked call.

Ms. McCottry said that her boyfriend, Adrian Davis, had come to her house and was "jumping" on her again—"using his fists." J.A. 8. She told the 911 operator that after Davis hit her, he ran out the door, got into a car, and drove away. J.A. 9-10. Ms. McCottry had earlier obtained a court order prohibiting Adrian Davis from contacting her. Tr. 4:78.

In a highly agitated state during the 911 call, Ms. McCottry told the operator that Davis had come over to her residence when another man was present.[2] J.A. 12. Davis began arguing with her about the other man, and when Ms. McCottry told Davis to leave, he jumped up and started beating her in front of the other man. J.A. 12. Ms. McCottry told the 911 operator that she had repeatedly told Davis not to

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[1] The 911 tape is part of the appellate record, and a digital copy has also been provided to the Court.

[2] The other man, known only as "Mike," was never further identified by Ms. McCottry or the police. Tr. 4:11. This individual apparently left Ms. McCottry's house before the police arrived.

come over to her residence.[3] J.A. 12. At one point during the 911 call, Ms. McCottry left the telephone and closed her front door to try to keep Davis from returning. J.A. 11. The 911 operator told Ms. McCottry that the police would come and check the area to try to find Davis, and then would come and talk with her. J.A. 11.

Within four minutes of the 911 call, Kent Police Officers Mark Jones and Steve Tamanaha arrived at Ms. McCottry's residence. Tr. 4:74, 76. Ms. McCottry and her three children were present, and the officers observed that the house was in disarray, with clothes strewn all over. Tr. 4:75. There was damage to a wall adjacent to a rocking chair. Tr. 4:75. Ms. McCottry was very upset, and it appeared that she had been crying for some time. Tr. 4:76. Her eyes were swollen and red, she had tears on her face, and her hair was a mess. Tr. 4:76. She was frantically running around the house packing, throwing clothes into bags and trying to manage her children at the same time. Tr. 4:76. In her panicked state, she told the officers that she had to get out of the house. Tr. 4:76, 96.

Officer Jones, who was serving as a trainee officer, was also a long-time firefighter and medic. Tr. 4:9-10. He observed several injuries to Ms. McCottry, including red abrasions to her left forearm, which were starting to bruise, and another red mark on her right forearm close to her elbow. Tr. 4:80-81. She also had a red mark on the left side of her face near her eye, which was beginning to swell. Tr. 4:80. All of her injuries appeared to be recent. Tr. 4:84-85, 98, 100. The onset of bruising indicated to Officer Jones that the injuries were fresh. Tr. 4:85. The officers photographed Ms. McCottry's injuries. Tr. 4:81-83.

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[3] A portion of the 911 tape where Ms. McCottry told the 911 operator that Davis and the police had been there two days earlier was edited from the tape played to the jury. Tr. 2:51.

While Ms. McCottry was running around the house getting ready to leave, she described to the officers how Davis had hit her in the face and how she had tried to block as many blows as she could. Tr. 4:11-15. The trial judge, exercising his discretion, concluded in a pretrial ruling that Ms. McCottry's statements to the officers did not qualify as excited utterances. Tr. 4:46-51. The judge ruled that the 911 tape, after redaction of Ms. McCottry's statement that the police had been called to her home two days earlier, was admissible as an excited utterance. Tr. 4:46.

Although under subpoena, Michelle McCottry failed to appear for trial and could not be located. Tr. 5:5-6. The State's case consisted of the redacted 911 tape and the testimony of the arriving police officers regarding their observations of Ms. McCottry's behavior and demeanor, including proof of her injuries. Tr. 4:73-96; 911 tape. The State also introduced a copy of the court order that had been served on Adrian Davis prohibiting him from having any contact with Michelle McCottry. Tr. 4:78. Davis did not testify at trial, nor call any witnesses on his own behalf.

A jury found Davis guilty of the crime of Domestic Violence Felony Violation of a Court Order for the willful violation of the protection order and intentional assault of Michelle McCottry, and he was sentenced to 15 months confinement. J.A. 83-95.

2. Davis appealed his conviction to the Washington Court of Appeals. On March 10, 2003, that court upheld the introduction of Michelle McCottry's statements on the 911 tape as excited utterances. J.A. 96-101.

The Washington Supreme Court granted review and heard argument on two issues. Subsequently, this Court issued its opinion in *Crawford v. Washington*, 541 U.S. 36 (2004), and the Washington Supreme Court ordered supplemental briefing and argument. On May 31, 2005, the Washington Supreme Court issued its final opinion. J.A. 116-38 (*State*

v. Davis, 111 P.3d 844 (Wash. 2005)). In an 8-1 decision, the Washington Supreme Court held that Ms. McCottry's excited utterance statements on the 911 tape identifying Davis as her assailant were not testimonial in nature because there was no evidence that Ms. McCottry sought to "bear witness" in contemplation of legal proceedings. J.A. 128-29. The Washington Supreme Court also found that, to the extent certain statements in the 911 call could be deemed testimonial because they were not concerned with seeking assistance and protection from peril, any error was harmless beyond a reasonable doubt; Ms. McCottry's identification of Davis as her assailant was non-testimonial and properly admitted, and the officers arrived within four minutes of the 911 call and observed and documented her fresh injuries with photographs. J.A. 128-29.

3. The role of 911 operators is important to deciding whether Ms. McCottry's statements were testimonial for purposes of the Confrontation Clause.

Petitioner correctly notes that "operators in Kent, as elsewhere, are trained to gather information from callers and to coordinate quick responses." Petitioner's Brief at 3. Petitioner then outlines very generally the role of the operator but focuses on a passage indicating that, because an arrest may occur based on their dispatches, operators should "[q]uestion aggressively" and "[b]e tenacious in obtaining information from reporting parties." *Id.* (citing the Standard Operating Procedures, Section 4, at 29). This is true, but irrelevant to the question presented. As the rest of the manual shows, operators do not "question aggressively" in the manner of police interrogation.

The role of the operators is more fully described in materials from the Valley Communications Center submitted to the Washington State Supreme Court. *See* Answer to Brief of Amicus WACDL, Appendix B. (*hereinafter* Answer to WACDL). The operator's basic job description is as follows:

> This is responsible, time sensitive work involved in the transmission of radio and telephone messages and requests for police and fire services. ... The employee is involved in dispatching police and fire response units in accordance with the location and nature of the call for assistance. [The employee must] [q]uickly and accurately answer[] urgent radio transmissions from field units. . . .

Answer to WACDL at B-1. The operator's job is to "interview[] callers requesting police assistance." J.A. 112 (1.0 Purpose/References). She is to follow a procedure to "*quickly* classify the reporting party's situation and create a CAD incident." J.A. 112 (3.0 Procedure) (italics added). She asks rudimentary information that will be required to coordinate a response such as, "Where . . . What . . .When . . . Weapons . . . Who . . . Why . . ." and basic information about the reporting person. *See* J.A. 113-14. These "six w's" capture "the information that is *necessary to process an incident.*" Answer to WACDL at B-16 (italics added).

The manual warns operators not to spend precious time on information that is not central to resolving the situation.

> Often determining why a situation has occurred will help complete the "picture." Are drugs and alcohol involved? Is the fight really a shoplift where the security officer has confronted a suspect? Is the neighbor threatening the [reporting party] over a property dispute? Be careful, however, not to get caught up in the history leading to an event. This can be time consuming and not relevant to the immediate situation.

Answer to WACDL at B-19.

Regarding weapons, operators are trained that "[f]ield unit and citizen safety must be of primary concern," and that obtaining information about weapons "is part of painting the mental image for responders." *Id.* at B-18. The manual notes

that domestic violence calls "are one of the most dangerous calls that the field units respond to. . ." *Id.* at B-26.

Regarding names and dates of birth, the manual instructs that "the call receiver must ascertain who has reported the incident by name, phone number, relationship, and if necessary, address. Always obtain [reporting party] information. . . . On some types of calls, the date of birth should be obtained. For example, violation of restraining orders, domestics, warrant suspects. The dispatcher can then run the name in the [criminal records computer database] to ascertain valuable information regarding the individual(s) the Officers will be contacting." *Id.* at B-19.

911 calls are recorded for a number of reasons. First, they are recorded because defendants demanded recording, claiming that a failure to record violated, inter alia, their rights under the Confrontation Clause. *See e.g. State v. Cain*, 613 A.2d 804 (Conn. 1992) (defense claim that 911 tapes must be preserved to protect a defendant's rights; description of the history of the 911 system). Second, the recordings assist investigation by confirming details that an unavailable caller might not be able to provide to detectives after the fact. The recordings capture the declarant's tone of voice, inflection of voice, and manner of speaking, as well as background noises like shrieks, shouts, exclamations, gunshots, a slamming door, or the wail of approaching police sirens. These sounds can be instrumental in investigation. Third, the recording can be relevant in civil litigation concerning whether police responded appropriately to the call for assistance. *See, e.g.*, *Cummins v. Lewis County*, 98 P.3d 822 (Wash. App. 2004) (civil suit alleging failure to properly respond to medical emergency). Finally, the recordings frequently will have an independent evidentiary value at trial. *See United States v. Inadi*, 475 U.S. 387, 395 (1986) (recorded co-conspirator statements "provide evidence of the conspiracy's context that

cannot be replicated, even if the declarant testifies to the same matters in court").

SUMMARY OF THE ARGUMENT

This Court should hold that an emergency call to a 911 call center is not a testimonial statement under the Confrontation Clause because such calls—received to facilitate an immediate response by emergency personnel—resemble neither the investigative affidavits gathered by justices of the peace historically, nor statements taken during a formal, structured police interrogation. Testimonial statements are those produced by investigators with an eye toward trial, where the prospect of litigation can have a distorting influence on the production of the statement. Recorded 911 calls like the one at issue in this case have no relevant historical analogue, and do not present the same dangers of prosecutorial manipulation that tainted the statements used in the civil-law mode of criminal procedure of the 16th and 17th centuries.

1. The Confrontation Clause regulates only a narrow subset of out-of-court statements, and is thus distinct from the general rules against hearsay. The text of the Confrontation Clause suggests no intent to regulate hearsay in general, and the common law confrontation right that gave rise to the Clause illustrates an acute concern with a specific type of out-of-court statement commonly used as a substitute for live testimony in the 16th and 17th centuries—formal examinations prepared by justices of the peace performing an essentially investigative and prosecutorial function. The Framers were keenly aware that statements produced *ex parte* by governmental investigators with an eye toward trial posed a unique potential for prosecutorial abuse, and the Confrontation Clause was the tool the Framers employed to prevent reintroduction of such abuse. The more flexible hearsay

rules, on the other hand, were intended to regulate general use of out-of-court statements. Efforts to conflate the constitutional and hearsay doctrines, whether done in the manner of *Ohio v. Roberts*, 448 U.S. 56 (1980), or in the manner now suggested by the Petitioner, should be rejected.

The Confrontation Clause creates an immutable barrier to the use of testimonial statements, whereas the general prohibition against hearsay is more flexible, allowing states to legislate exceptions. An absolute constitutional prohibition is appropriate to curtail abuses whereby governmental agents create or produce testimony in secret. But constitutional scrutiny of routine out-of-court statements that fall solely within the traditional hearsay realm is unnecessary, as the government does not "produce" such evidence through structured police interrogation. Greater flexibility in the hearsay realm is needed so that hearsay rules can evolve in light of changing social attitudes and priorities. That flexibility is provided by leaving the states to control admissibility of non-testimonial hearsay by legislation and rules.

2. A statement is testimonial hearsay under the Confrontation Clause only if it was produced in a manner that resembles the historical abuses of the Sir Walter Raleigh era, when investigators had free rein to produce evidence through interrogation of suspects and witnesses in a manner that shaped such evidence to suit the needs of the prosecution. Examples of such evidence include affidavits, depositions, prior testimony from grand jury hearings or preliminary proceedings, and coroner reports. Statements gathered by police detectives pursuant to tactically structured, targeted police interrogation, like the interrogation of Sylvia Crawford, are testimonial as well, because they bear a striking resemblance to the interrogations of suspects and witnesses performed by justices of the peace.

But structured police interrogation, in its colloquial sense, does not include *all* questioning by *anyone* associated with

police. Rather, police interrogation resembles the historical abuses regulated by the Confrontation Clause only when police ask formal, tactically structured questions, pursuant to a criminal investigation, aimed at producing evidence for use at trial. Such questioning occurs only where the police practice is one that may reasonably be interpreted as an effort to build a case against an identified defendant, and where the circumstances lend themselves to such manipulation.

Efforts by police to assess and respond to a dynamic, potentially dangerous public safety threat will not meet this definition. Police responding under such circumstances are performing a community caretaking function that simply does not resemble the historical abuses, and is thus beyond the scope of the Confrontation Clause.

Whether a statement was made under conditions that resemble the historical abuses, and is therefore testimonial, thus turns on an objective assessment of the totality of the circumstances, including the identity of the governmental actor and whether there was a formal interrogation involving structured questioning. Determining whether a testimonial statement was produced does not depend on assessing the mental state of the declarant or the questioner.

This approach to the Confrontation Clause places the constitutional analysis on a firm conceptual foundation without changing the result of past Confrontation Clause decisions by this Court. Prior testimony, depositions, affidavits, accomplice confessions and the like will readily be excluded. On the other hand, statements made to governmental authorities responding to an emergency will be non-testimonial, as will statements made to private parties. Such ordinary hearsay will be governed by legislation and rules in the individual states.

3. Under this test, statements typically made in an emergency 911 call are not testimonial. 911 calls are initiated and

produced by the declarant. Operators who field 911 calls primarily initiate and coordinate an immediate response to an emergent situation; they are not investigative governmental agents bent on shaping testimony for use at trial. Nor are they investigators gathering information after the filing of a formal charge; there has been no formal or informal determination as to whether a crime has been committed. The questions asked in this case illustrate that the focus is on coordinating a response rather than on building a case for trial.

4. Petitioner argues that statements made during 911 calls should not be admitted at trial absent the live testimony of the declarant because such statements would not have been recognized as an exception to the rules against hearsay at the Founding. In so doing, he attempts to resuscitate an approach rejected by this Court in *Crawford*—the intermixing of constitutional analysis and hearsay rules. Merely alleging the absence of an "excited utterance" exception at the Founding does little to answer the question of whether 911 statements are "testimonial." Petitioner's approach offers a hearsay-based rationale for excluding these statements under the Confrontation Clause, which begs the question whether the statements are governed by the Clause in the first place.

5. The "functional equivalent" test proposed by Petitioner would count as "testimonial," and thus exclude under the Confrontation Clause, any out-of-court statement where the reasonable declarant would have anticipated that her statement might be used for law enforcement purposes. This test has no roots in the text or history of the Confrontation Clause, and is virtually without limits. The elasticity of this test is demonstrated by the way it has already shifted shape over a relatively short period of time. Its expression at the time of the *Crawford* decision focused on statements that a declarant would reasonably *expect* to be used *prosecutorially*. The current formulation asks whether the declarant would anticipate that her statement *might* be used for *law enforcement*

purposes. Petitioner's test paints with too broad a brush, and cannot be justified under the Confrontation Clause.

6. Finally, the assumptions that underlie the proposition that an "objectively reasonable declarant" who calls 911 knows exactly how her statements ultimately will be used are flawed. It is unlikely that our diverse society is comprised of such like-minded individuals, sharing knowledge equally and understanding it as one. Moreover, it defies common sense to suppose that a person who calls 911 in the midst of, or in the immediate aftermath of, a harrowing experience has any "objectively reasonable" thoughts at all.

This test is already proving unworkable. Some courts, in attempting to discern how an "objectively reasonable" person calling 911 would expect her statements to be used, have concluded that statements made even in the midst of a distressing incident are "testimonial" by that measure. In finding such statements inadmissible under the Confrontation Clause, these courts have excluded from trial statements that bear little resemblance to those at which the Clause was targeted. Other courts, applying the selfsame test to statements made under virtually identical circumstances, have found the statements not to be "testimonial."

Placing the focus on the declarant's intent, either subjective or objective, does not resolve the question of what statements are "testimonial" for Confrontation Clause purposes. Placing the focus instead on the manner in which the statements were obtained, by examining the actions of the governmental actors, better targets the type of statements that are the core concern of the Confrontation Clause.

ARGUMENT

I. EMERGENCY 911 CALLS ARE NOT GOVERNED BY THE CONFRONTATION CLAUSE.

The confrontation clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The question in this case is whether a recorded telephone call to a 911 call center is a "testimonial" statement such that the caller is a "witness against" the accused. Because such calls do not resemble the *ex parte* examinations that the Confrontation Clause was meant to exclude, the State of Washington respectfully urges this Court to hold that the 911 calls are not testimonial.

A. *Crawford* Sharpened Confrontation Clause Analysis By Narrowing Its Scope And Making It More Absolute.

Over the last few decades, members of this Court and commentators have noted that Confrontation Clause jurisprudence had become both too narrow and too broad. The analysis was too narrow because it permitted admission of testimonial statements like accomplice confessions that would not have been tolerated by the Framers, yet it was too broad in that constitutional scrutiny was extended to non-testimonial hearsay. These difficulties stemmed from the fact that the Court's constitutional analysis had strayed from the text and history of the Clause, thus blurring the distinction between constitutional analysis and hearsay analysis. *See Crawford*, 541 U.S. at 60-61 (citing *Lilly v. Virginia* 527 U.S 116, 140-43 (1999) (Breyer, J., concurring)); *White v. Illinois*, 502 U.S. 346, 366 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment); Akhil Reed Amar, The Constitution and Criminal Procedure: First Principles 125-31 (1997); Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 Geo. L. J. 1011

(1998). In *Crawford v. Washington*, a majority of the Court sharpened the focus of Confrontation Clause analysis by returning to its text and history.

The words of the Clause—"witness against him"—suggest that the Clause was intended to ensure confrontation as to actual trial testimony, and no more. *Dutton v. Evans*, 400 U.S. 74, 94 (1970) (Harlan, J., concurring in result); *White v. Illinois*, 502 U.S. at 359-60 (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment). Although the noun "witness" can include a person who simply sees an event, as well as a person who testifies about the event in court, the Clause uses the phrase "witness *against him*," indicating that it was intended to apply only "to those who give testimony against the defendant at trial." *Maryland v. Craig*, 497 U.S. 836, 864-65 (1990) (Scalia, J., dissenting) (italics in original).

This interpretation of the Confrontation Clause sees the Clause "as part of the mechanism for controlling the central government" and as part of "a package of rights" guaranteed by the Bill of Rights. Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 Minn. L. Rev. 557, 563 (1992). It also ensures that the term "witness" will have a consistent meaning under both the Confrontation Clause and its "fraternal twin," the Compulsory Process Clause.[4] *See* Akhil Reed Amar, *Sixth Amendment First Principles*, 84 Geo. L. J. 641, 694-95 (1996).

Under this purely textual view, constitutional analysis and hearsay analysis are wholly distinct, such that the Constitution would never regulate hearsay. But this purely textual interpretation seemed in tension with the common law history

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[4] "In all criminal prosecutions the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor. . . ." U.S. Const. amend VI.

of the confrontation right, and with this Court's early decisions. *White v. Illinois*, 502 U.S. at 360 (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment).

In *Crawford*, this Court reexamined the common-law and statutory roots of the right to confront witnesses, and concluded that the Sixth Amendment must be interpreted in light of the fact that it was designed to prevent use of a very narrow class of "testimonial" out-of-court statements. Specifically, this Court concluded:

> [T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh's; that the Marian statutes invited; that English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried.

Crawford, 541 U.S. at 50.

With this historical framework in mind, the Court returned to the text of the Clause and concluded that the text "reflects an especially acute concern with a specific type of out-of-court statement," and not with all hearsay. *Id.* at 51. The Clause "applies to 'witnesses' against the accused—in other words, those who 'bear testimony.'" *Id.* Testimony is "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* (quoting 1 N. Webster, An American Dictionary of the English Language (1828)).

This text and history illustrate that the scope of the Clause does not depend on the scope of hearsay law. Just as the Framers "would not have condoned" the use of testimonial *ex parte* examinations regardless of their admissibility under "modern hearsay rules," so, too, the Clause's narrow focus on the evils of the civil-law mode of procedure "also suggests

that not all hearsay implicates the Sixth Amendment's core concerns" because simple hearsay "bears little resemblance to the civil-law abuses the Confrontation Clause targeted." *Crawford*, 541 U.S. at 51.[5] A person who makes an off-hand remark to an acquaintance is clearly not "testifying" in the constitutional sense, so the use of such statements at trial ought to be governed by the hearsay rules, not the Constitution. In short, this Court adopted the view that the Clause is "narrow but absolute." *See* Akhil Reed Amar, *Confrontation Clause First Principles: A Reply to Professor Friedman*, 86 Geo. L. J. 1045 (1998).

If the Confrontation Clause and the hearsay rules are independent, then it follows that the test for testimonial statements must be independent of the test—historical or modern—for hearsay. If a statement is testimonial, it should not be admitted even if it falls within a modern hearsay exception. Likewise, if the statement is *non*-testimonial under constitutional analysis, it does not *become* testimonial simply because it may have been inadmissible hearsay in 1791.

So, too, for the question in this case. Whether 911 calls are testimonial statements must be answered by defining the term "testimonial," not by proving that a 911 call falls either within or without a hearsay exception. Only if the test for testimonial statements is closely tied to the historical abuses the Confrontation Clause was designed to prevent, can it be sufficiently narrow to serve primarily as a check on truly "testimonial" statements, and not as a super-hearsay rule.

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[5] *See also Crawford*, 541 U.S. at 61 ("Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of `reliability.'").

B. A Statement Is Testimonial Only If It Was Produced Using Investigative Practices That Closely Resemble The Historical Abuses Addressed By The Confrontation Clause.

1. In *Crawford*, this Court listed "various formulations of this core class of testimonial statements," but did not choose any one formulation as a definitive test. *Crawford*, 541 U.S. at 51-52, 68.[6] The formulation that hews closest to the text and the historical roots of the Clause was first suggested by Justice Thomas in a concurring opinion, and would limit testimonial statements to documents that resemble "extra-judicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." *Crawford*, 541 U.S. at 51-52 (quoting *White v. Illinois*, 502 U.S. at 365 (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment)). It is these materials that were "historically abused by prosecutors as a means of depriving criminal defendants of the benefit of the adversary process." *White v. Illinois*, 502 U.S. at 365 (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment).

This focus on *production* of evidence by government officials distinguishes "testimonial" statements from other out-of-court statements. It is the specter of litigation that can encourage slanting and distortion. It is in the *production* of evidence that "an artful or careless scribe may make a witness speak what he never meant, by dressing up his depositions in his own forms and language." 3 William Blackstone, Commentaries on the Laws of England 373 (1768). As one commentator observed, "Allowing the government to use

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[6] The "various formulations" included tests recommended by the petitioner in *Crawford*, by Justice Thomas in *White v. Illinois*, and by Amici National Association of Criminal Defense Lawyers. *Crawford*, 541 U.S. at 51-52. The respondent in *Crawford* did not propose a test for testimonial statements.

evidence obtained through private interviews markedly enhances the potential for abuse. The prosecution has the incentive and the power to shape the witness's answers in accordance with its theory of the case." Berger, *The Deconstitutionalization of the Confrontation Clause*, 76 Minn. L. Rev. at 561.

The historical abuses under the Marian statutes had this quality of governmentally-directed evidence production. Justices of the peace were appointed by the Crown, supervised the work of the local constable, and issued search and arrest warrants. David A. Sklansky, *The Private Police*, 46 UCLA L. Rev. 1165, 1198 (1999). When a suspect was arrested, a justice of the peace questioned suspect, complainant, and witnesses. *Id.* The system "was designed to collect only prosecution evidence." John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 Mich. L. Rev. 1047, 1059-60 (1994). The justice of the peace, who was customarily a local gentleman active in civic affairs, was required to interview witnesses and the suspect, transcribe anything that was "material to prove the felony," and transmit the documents to the trial court, where they could be used as evidence against the accused. *Id.* The justice of the peace was "a partisan rather than a truth-seeker," whose role ensured that the resulting proceedings had a "strong prosecutorial bias." John H. Langbein, The Origins of Adversary Criminal Trial 43 (2003).

Such *ex parte* examinations could be as detailed and comprehensive as an in-court examination, and could include trappings of testimony or depositions, like oaths, signatures, or a formal structure that suggested the solemnity and the accusatorial nature of testimony. It was this resemblance to historical abuses that this Court noted in *Crawford*—the "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuses—a fact borne out time and again

throughout a history with which the Framers were keenly familiar." *Crawford*, 541 U.S. at 56 n. 7.

The "resemblance" test for testimonial statements—asking whether the procurement and subsequent admission of the statement at issue resembles the historical procedures whose potential for abuse so troubled the Framers—gives effect to this Court's "narrow but absolute" interpretation of the Confrontation Clause. It preserves the emphasis on targeted interrogation designed with litigation in mind, and includes tactically-structured police questioning designed to elicit a statement that will satisfy the elements of a crime. It follows that "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and police interrogations . . . are the modern practices with the closest kinship to the abuses at which the Confrontation Clause was directed." *Crawford*, 541 U.S. at 68.

The in-custody, tape-recorded interrogation of Sylvia Crawford easily fits this definition. Sylvia had been arrested with her husband Michael after Michael stabbed a man, apparently in retaliation for an earlier assault against Sylvia. Sylvia witnessed the stabbing and investigators considered her a suspect. *Crawford*, 541 U.S. at 65. Her statement was extracted after a second round of nighttime, station-house interrogations, and after she had been warned that she had a right to counsel and that any statement she gave could be used against her in a court of law.[7] *Id.* at 38-39. The questioning was leading, targeted, occurred over a protracted period, and was recorded to preserve her statement for use at trial. The police interrogation of Sylvia Crawford, viewed objectively, bore a "striking resemblance to examinations by justices of the peace in England," and thus carried the very real danger that police investigators who created these

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[7] *See Miranda v. Arizona*, 384 U.S. 436, 479 (1966) ("anything [you] say [ ] can be used against [you] in a court of law").

circumstances, and who asked repeated, leading questions, would "produce" evidence that was favorable to a prosecution. The statement was imbued with testimonial qualities, and would clearly have been deemed testimonial by the Framers. *Id.* at 52.

2. The question remains whether other modern police practices are sufficiently similar to the historical abuses to fall within the Confrontation Clause. Some police interrogation is less vigorous than the repeated, intensive, suspect-oriented interrogation of Sylvia Crawford, but may still be "structured police interrogation" that resembles *ex parte* examinations. *Crawford*, 541 U.S. at 54 n.4. On the other hand, not every question or series of questions posed by a governmental actor will be "police interrogation."

A natural starting point in refining the definition of testimonial is to define the term "interrogation." In *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), this Court held that interrogation under the Fifth Amendment included "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." In *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980), this Court expanded that definition and concluded that under *Miranda*, "interrogation refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Innis*, 446 U.S. at 298.

But in *Crawford*, this Court eschewed this more legalistic definition, and said that for Sixth Amendment Confrontation Clause purposes it "us[ed] the term `interrogation' in its colloquial, rather than any technical legal, sense. *Cf. Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980)." *Crawford*, 541 U.S. at 53 n.4. Indeed, the technical legal analysis of interrogation is a tangled bramble of definitions, *see* Yale Kamisar, *Brewer v. Williams, Massiah* and *Miranda: What is*

"Interrogation"? When Does it Matter?, 67 Geo. L. J. 1, 41-55 (1978), and this Court properly recognized that it was unnecessary to enter that thicket. A colloquial definition of interrogation will prevent practices that resemble the historically forbidden inquisitorial practices, without turning every hearsay question into a constitutional question. Thus, the Confrontation Clause can be applied consistent with its intended scope.

Interrogation means "to question typically with formality, command, and thoroughness for full information and circumstantial detail." Webster's Third New International Dictionary of the English Language, Unabridged 1182 (1993). This definition overlaps the definition of "testimony" used by this Court in *Crawford*, 541 U.S. at 51 ("[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact"). The definition of interrogation includes the notion of formality. It includes the term "command," suggesting a directorial role on the part of the questioner. It also suggests the need or desire for a thorough, full examination, akin to what one would expect from testimony, or from a deposition. Thus, the colloquial use of the term interrogation properly focuses on aspects of a police-witness exchange that one would expect to find in the inquisitorial practices that "the founding-era rhetoric decried." *Crawford*, at 50.

3. The *Crawford* "resemblance" test thus contains a number of key, overarching concepts that distinguish routine cases like this one from cases like *Crawford*. Those concepts may be distilled into the following test.

A statement is testimonial only if it was produced in a manner that resembles the historical abuses of justices of the peace. This can only occur where the questioning is done by a governmental official with a primarily investigative function who, acting in his investigative capacity, conducts a structured interrogation, under circumstances where the in-

vestigator could manipulate or shape the witness's statement into something that resembles trial testimony.[8]

Under this test, 911 operators or police acting to defuse a public safety threat are not functioning as investigators such that they can, or will, shape a witness's statement. This public safety consideration logically distinguishes statements taken in many cases from the types of testimonial statements the Confrontation Clause was meant to exclude.

The test could be applied in a variety of circumstances. First, the identity of the questioner must be evaluated to determine whether the challenged statement was made to a governmental investigator who was acting in his role as investigator at the time he received the information, as opposed to a 911 operator or a police officer acting primarily in a community-caretaking role. The inquiry should focus on whether the person has "an essentially investigative and prosecutorial function." *Crawford*, 541 U.S. at 53.

Second, the nature of the investigator's inquiries must be probed to determine whether investigatory questions were posed in a structured, targeted and formal manner that is, objectively viewed, characteristic of an attempt to create a witness statement for later use at trial. In other words, the investigator must be conducting a structured police interrogation.

Third, the circumstances of the interrogation must be such that the interrogator had the opportunity and the ability, judged objectively based on the totality of the circumstances, to manipulate or shape the witness's statement into something that resembles trial testimony.

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[8] This test bears a close resemblance to one recently proposed in a learned treatise on evidence. *See* 30B Michael H. Graham, Federal Practice and Procedure § 7032, SPECIAL REPORT: *CRAWFORD v. WASHINGTON*, at 75-76 (Supp. 2005).

These factors will seldom be satisfied when governmental agents are in the initial stages of responding to a public safety threat, as those circumstances simply do not lend themselves to the production and manipulation of testimonial statements. Each of these characteristics can be evaluated objectively based on evidence presented to the court, and without regard to the state of mind of the interviewer or the declarant. An actual public safety threat or emergency would not be required by the rule, so long as the evidence would have caused a reasonable person to believe that a public safety threat existed.

The resemblance test is wholly consistent with this Court's prior cases. For example, prior trial testimony is clearly testimonial, but subject to the exception that a prior opportunity to cross-examine would satisfy the clause. *Mattox v. United* States, 156 U.S. 237 (1895). Likewise, prior testimony at a preliminary hearing would still be considered testimonial, but admissible if the defendant had an opportunity to cross-examine at that hearing. *Ohio v. Roberts*, 448 U.S. at 67-70. An accomplice confession to robbery and murder obtained after repeated, in-custody police interrogations would be subject to exclusion under the Clause. *Lilly v. Virginia*, 527 U.S. at 120-21. *See also Lee v. Illinois*, 476 U.S. 530, 531-36 (1986) (accomplice confession) *and Douglas v. Alabama*, 380 U.S. 415 (1965) (same). Statements volunteered by an accomplice to another inmate and then reported to authorities would *not* be testimonial because there is no governmental role in production of the testimony. *Dutton v. Evans*, 400 U.S. at 77-78.[9]

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[9] As this Court noted in *Crawford*, there may be some tension between the resemblance test and the result in *White v. Illinois*, where the trial court permitted use of a child's statement to the police officer. *See Crawford*, 541 U.S. at 58 n. 8 (discussing *White v. Illinois*, 502 U.S. at 349-51). *White* does not resolve this tension because the Court did not assess the precise circumstances under which the statement was made. Child welfare

Similarly, statements made unwittingly to a Federal Bureau of Investigation informant would *not* be testimonial. *Bourjaily v. United States*, 483 U.S. 171, 181-84 (1987). Although police may record co-conspirator statements, such statements do not resemble testimonial statements because, by their very nature, they do not occur under structured police interrogation such that the declarant can be said to bear witness against the accused. The statements are a part of the crime itself, so it hardly can be said that the declarant is providing "[a] solemn declaration or affirmation . . . for the purpose of establishing or proving some fact." *Crawford*, 541 U.S. at 51.

C. Statements Made During Emergency 911 Calls Are Not Testimonial Because They Are Not Investigative, Are Gathered In Responding To A Public Safety Threat, And Do Not Have the Same Potential For Manipulation As Existed With Inquisitorial Practices.

Applying these three criteria to 911 calls, and to this call in particular, it is clear that the recording of emergency 911 calls like the one at issue in this case is a modern practice with no kinship to the forbidden inquisitorial practices. In fact, such recorded calls differ from historical *ex parte* examinations under each criterion.

1. A 911 operator is not a governmental agent with an "essentially investigative and prosecutorial function." *Crawford*, 541 U.S. at 53. The operator is a facilitator—a conduit

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cases pose particularly difficult challenges for police officers, who must be alert to safety issues beyond those stemming directly from reported crime. For example, if the alleged assailant is a relative or family friend, the officer needs to assess the chances that the assailant will be permitted to return to the home after the officer leaves. A myriad of other considerations may be relevant in child abuse cases, and the holding urged in this case will not foreclose this Court's independent consideration of those issues in an appropriate case.

between the caller and the police—rather than an investigator. Neither legal training nor a police commission is required for the job, suggesting that operators do not have the specialized knowledge that would permit them to tailor or shape a declarant's statement to meet the elements of a crime. *See* Answer to WACDL at B-3, 7. In other contexts, courts have noted that 911 operators do not generally have training equivalent to that of police officers, and they do not assess evidence or make subjective or qualitative legal judgments about that evidence. *United States v. Colon*, 250 F.3d 130, 136-38 (2nd Cir. 2001) (knowledge of 911 operator cannot be imputed to officers under the collective knowledge doctrine). There is no reason to conclude that they are equivalent to police officers in this constitutional context. As is evident in the basic 911 protocol, an operator is to obtain the information necessary to coordinate a response to a perceived public safety threat. J.A. 112-15.

Questions from a non-investigative governmental contractor simply do not resemble the forbidden inquisitorial practices, nor do they resemble police interrogation in its colloquial sense.

2. 911 operators do not interrogate callers with an eye toward trial. In fact, the training manual recommends that operators not get bogged down in details about the event and its history that are extraneous to the immediate response. Answer to WACDL at B-19. They are reminded to treat the caller with courtesy and respect, *id.* at B-15, and that their attitude may determine how "responders" are treated at the scene. *Id.* at B-14. Nothing in the manual suggests that operators are to interrogate the caller.

Moreover, the entire interaction is initiated by the caller, not the 911 operator. This is not a governmentally driven effort to produce evidence pursuant to a criminal case, but rather an effort to respond to a public safety issue as expeditiously as possible.

The questions asked in this case are illustrative of the operator's role. They occurred in the following sequence and may be paraphrased as follows: 1) What's going on? 2) Are you in a house or apartment? 3) Are there any weapons? 4) Has he been drinking? 5) What is his name and date of birth? 6) How and in what direction is he fleeing? 7) Do you need an aid car? 8) Is this your ex-husband or boyfriend? 9) Did he force his way into the house—or . . . 10) What is your name and date of birth (because Ms. McCottry said she had a restraining order) 11) Is your door locked? J.A. 8-13.

These questions are reasonably directed at ensuring a safe, prompt response. A responding police officer must know what is alleged to have happened, whether weapons are involved, whether participants are under the influence of alcohol or drugs, and whether the suspect is alone or with others, in order to assess the likelihood of risk to the officer. The identity and description of the suspect, his means of travel, and the direction of travel are all relevant in order to intercept and question the suspect if it should be determined that he poses an immediate public safety threat. The relationship of the suspect to the complainant can also assist the officer in deciphering the situation once the officer is on-scene. Questions like "Did he force his way into the house?" inform the officer about the level of violence or volatility.

All these questions paint a picture for the responding officer that helps him assess the risk posed to himself and the public by this situation. Such questions do not transform the conversation into a police interrogation akin to that at issue in *Crawford*.

Nor is the analysis different in this case simply because Ms. McCottry was not on the line when the 911 operator answered the call.[10] 911 operators immediately attempt to

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[10] The record does not establish whether the original call was terminated by Ms. McCottry or by the Petitioner.

reinstate contact following an aborted 911 call; simply because a call has been terminated does not mean there is no emergency. In fact, a hang-up call can suggest an escalating situation rather than one that is being peacefully resolved. An assailant may have forcibly terminated the call against the caller's will, or the caller may be ill or injured, causing her to inadvertently disconnect the call. In any event, a 911 operator is not transformed into an investigator seeking to produce evidence for an *ex parte* trial simply because she seeks to discover whether the caller is truly in need of assistance.

3. The third factor—that circumstances permit manipulation of the statement—is not met in this context. When an operator fields a 911 call she is in no position to determine whether a crime has occurred, much less which crime, and she is thus unable to shape the witness's testimony to meet the elements of a crime. The public safety issue may, or may not, ripen into a criminal investigation, but at the point at which 911 operators are involved, there is simply no way to know. Again, this contrasts with justices of the peace, coroners, police interrogators, or prosecutors, who gather statements pursuant to an investigation, where a suspect has been identified, and a charge has been leveled or is at least anticipated.

In reality, the brevity of many 911 calls places limits on what "investigation" could be accomplished, and also distinguishes these situations from true interrogations. Ms. McCottry's conversation with the Valley Communications operator in this case lasted a mere four minutes. There is not sufficient time to develop anything remotely resembling an "interrogation" in such a brief interaction.

Ms. McCottry's call is typical of many calls to 911. The caller is in peril, and needs police intervention.[11] Under these

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[11] The Petitioner seems to suggest that there was no emergency in this case because Ms. McCottry declined an "aid" car. Petitioner's Brief at 42.

circumstances, the operator is not conducting a structured police interrogation that in any way resembles the inquisitorial practices that the Confrontation Clause was designed to prevent.

All these considerations illustrate that 911 tapes are fundamentally different in character from police interrogations or the historical abuses of the civil-law mode of criminal procedure that were sometimes employed in 16th and 17th century English trials. It cannot be said that the Framers would have understood the Confrontation Clause to prohibit use of evidence gathered in this manner. This area should be left to regulation by the rules of evidence rather than the Constitution.

II. PETITIONER'S PROPOSED APPROACH TO DEFINING TESTIMONIAL STATEMENTS IS FLAWED IN THEORY AND IN PRACTICE, AND SHOULD BE REJECTED.

Petitioner's approach is flawed at the outset. In arguing that Michelle McCottry's statements were "testimonial," and thus admitted in violation of the Confrontation Clause, he places great significance on his conclusion that spontaneous declarations were not excepted from the general prohibition on hearsay in 1791. This approach fails to recognize the

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This is incorrect. The term "aid car" in this context means an ambulance. *See* Answer to WACDL at B-15 (referring to "emergency calls . . . such as an aid or fire call"). Ms. McCottry declined because her injuries were not sufficient to warrant an ambulance. The tone of her voice, her heavy breathing, and the fact that she agreed to wait for police to arrive certainly suggest that she was afraid. She needed police to secure the scene long enough for her to flee with her children. After all, the Petitioner had been undeterred by a court order prohibiting contact, so it is natural that Ms. McCottry would need the police to cover her back as she escaped her own apartment. In any event, whether Ms. McCottry *subjectively* wanted help is irrelevant. The relevant question is whether the circumstances, objectively viewed, suggested that hers was a call for help. Clearly, they did.

separation between constitutional analysis and the rules of hearsay, a separation acknowledged by various justices of this Court over more than three decades, culminating in the *Crawford* decision.

Petitioner's proposed test for determining whether a statement is "testimonial" for purposes of the Confrontation Clause is likewise flawed. He argues that courts need look only to whether the statement is the "functional equivalent" of testimony; i.e., whether a reasonable declarant would have anticipated that her statement might be used for law enforcement purposes. This approach finds no support in the text or history of the Confrontation Clause. Moreover, the proposed test is so broad as to lack any real limiting principle. Finally, the test rests on assumptions that may reasonably be questioned, and it has proved to be unworkable in practice.

A. Petitioner's Historical Approach Fails To Recognize That This Court Has Explicitly Separated Confrontation Clause Analysis From The Hearsay Rules.

The general right to confront an accuser or witness, along with the preference for live testimony, has certainly existed for a very long time. Yet the question presented in this case is the extent to which this right is protected by the Confrontation Clause, and the extent to which further regulation is left to the law of hearsay. Defining the right by exegesis of hearsay law as it existed in 1791, as Petitioner attempts to do, simply returns this Court to a constitutional analysis rooted in hearsay law. This analytical approach was rejected in *Crawford*.

This Court has long recognized a distinction between the right protected by the Confrontation Clause and the rules that generally govern the admissibility of hearsay evidence:

> While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to pro-

> tect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. . . . The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied.

California v. Green, 399 U.S. 149, 155-56 (1970) (citations omitted). *See also Dutton v. Evans*, 400 U.S. at 86 ("It seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots. But this Court has never equated the two, and we decline to do so now."); *White v. Illinois*, 502 U.S. at 366 (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment) ("Neither the language of the Clause nor the historical evidence appears to support the notion that the Confrontation Clause was intended to constitutionalize the hearsay rule and its exceptions."); *Lilly v. Virginia*, 527 U.S. at 141 (Breyer, J., concurring) (a hearsay-based Confrontation Clause test is both too narrow and too broad). This Court in *Crawford* separated the two once and for all.

In effect, Petitioner makes the inverse of the argument made by Chief Justice Rehnquist in his concurring opinion in *Crawford*, and rejected by a majority of this Court. The Chief Justice argued that "[t]here were always exceptions to the general rule of exclusion" of hearsay evidence, and that those exceptions should continue to serve as exceptions to the constitutional rule. *Crawford*, 541 U.S. at 73 (Rehnquist, C.J., concurring in judgment). But this Court, distinguishing between testimonial statements and general hearsay, noted

that "there is scant evidence that exceptions were invoked to admit *testimonial* statements against the accused in a *criminal* case. Most of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy. We do not infer from these that the Framers thought exceptions would apply even to prior testimony." *Crawford*, 541 U.S. at 56 (italics in original). In other words, the Chief Justice's argument was flawed because it made the scope of the constitutional provision dependent upon the scope of the hearsay rules.

Petitioner makes a similar error in trying to define the scope of the Confrontation Clause by reference to the *absence* of certain hearsay exceptions. His argument begs the constitutional question, is analytically flawed, and must be rejected.

B. Petitioner's Definition Of "Testimonial" Statements Lacks Textual Or Historical Roots, And Is Overly Broad As A Result.

1. *Petitioner's Test Is Not Derived From The Text Or History Of The Confrontation Clause.*

Petitioner proposes that this Court define a "testimonial" statement as an out-of-court statement used at trial that "would operate as the functional equivalent of *ex parte* prosecutorial testimony." Petitioner's Brief at 41. He argues that courts, in applying this test, should inquire whether "a *reasonable declarant* would have *anticipated* that her statement might be used for law enforcement purposes." *Id.* (italics in original). This proposal should be rejected.

Not once in his brief does Petitioner identify the textual source of his proposed test in light of this Court's analysis in *Crawford*. *See Crawford*, 541 U.S. at 51-52; *White v. Illinois*, 502 U.S. at 359-60 (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment) (examining

the phrase "witness against him," and explaining that it suggests a focus on a very narrow class of out-of-court statements). Instead, he seems to argue that a declarant is a "witness against" a defendant if the declarant makes an accusation against the defendant. Under his argument, status as a "witness" turns on the content of the statement rather than on the manner in which the statement was produced. This mode of analyzing the Confrontation Clause is unprecedented, and cannot be squared with *Crawford*.

Nor does Petitioner tie his proposed test to the historical analysis set forth in *Crawford*—an analysis that led the Court to identify the principal evil at which the Confrontation Clause was aimed as the creation of evidence by *ex parte* examination. *Crawford*, 541 U.S. at 50. Instead, as discussed above, he examines the historical roots of hearsay exceptions and concludes that "the upshot of *this history* is that the Framers . . . understood the Confrontation Clause as making a 'procedural' choice about how the reliability of *evidence* 'can best be determined'—namely, by cross-examination." Petitioner's Brief at 21 (quoting *Crawford*, 541 U.S. at 61) (italics added). In *Crawford*, however, when this Court said that "[*t*]*his history* supports two inferences about the meaning of the Sixth Amendment[,]" *Crawford*, at 50 (italics added), it was referring to the history of inquisitorial abuses, not the history of hearsay in general.

In fact, the general right to confront witnesses was distinct in the common law from the nascent hearsay rules. "Concern to promote cross-examination became the central justification for the hearsay rule in later law." Langbein, The Origins of Adversary Criminal Trial 245. Throughout the 18th century, the lack of oath was seen as the primary justification for rejecting hearsay, and "concern about the want of cross-examination remained a muted theme in criminal practice." *Id.* Although the two doctrines overlapped to a degree in later years, the Framers would not have understood the history

(such as it was in 1791) of hearsay to be the same as the well-known and hated history of inquisitorial practices.

As indicated, this Court need not discern the state of hearsay law in 1791 in order to decide whether a statement is testimonial under the Confrontation Clause. Even if the Court were to undertake such an analysis, however, Petitioner's historical account of the law of hearsay is incorrect. *See* Brief of Amici Curiae Illinois et al. 05-5224. The spontaneous declaration exception to the developing hearsay rules was applied around the time of the founding. Although some courts refused spontaneous declarations, the rationale for refusal was often unclear, and there certainly was no generally recognized prohibition against the evidence. *Id.* at 4-15.

More particularly, Petitioner is mistaken to compare 911 calls to "hue and cry." Under "hue and cry," English citizens, prior to the advent of a professional police force, were *compelled* by the Crown to report crimes to the authorities and, in some cases, to actually effectuate the arrest of the suspect. This government-instituted compulsion was backed by the fact that, if they failed to fully comply with their reporting obligation, victims and witnesses could themselves be arrested, prosecuted, and imprisoned for the crime of misprision of a felony. *See* Christopher M. Curenton, *The Past, Present, And Future Of 18 U.S.C. § 4: An Exploration Of The Federal Misprision Of Felony Statute*, 55 Ala. L. Rev. 183, 183-85 (2003); *Branzburg v. Hayes*, 408 U.S. 665, 696 (1972). Because of the specter of their own freedom being taken away by the Crown, witnesses had a powerful incentive to implicate other citizens in criminal activity, regardless of the accuracy of their observations, and regardless of any doubt that they may have harbored regarding the suspect's guilt. Simply stated, these government-compelled statements are dissimilar to statements given by victims and witnesses, acting of their own free will, to 911 dispatchers and first

responders. These dissimilarities become more stark when one considers that in many, if not all, jurisdictions, it is a crime for a victim or witness to falsely accuse someone of a crime. *See, e.g.*, Wash. Rev. Code § 9A.84.040.

Thus, in lieu of the *Crawford* Court's approach to the text and history of the Confrontation Clause, Petitioner has relied on general assertions about the right to confront, as delineated by the scope of hearsay rules in 1791. This approach leaves his proposal rootless and elastic, with no principled way to distinguish Confrontation Clause analysis from hearsay analysis, or to limit the scope of the test he proposes.

2. *The "Functional Equivalent" Test Is Too Broad.*

Petitioner would deem a statement "testimonial" if it is "functionally equivalent" to testimony. The term "functional equivalent" is dangerously vague, as any out-of-court statement offered at trial to prove the truth of the matter asserted is functionally equivalent to testimony. And, although it can always be said that cross-examination would be *helpful* to the defendant, that fact does not transform a non-testimonial statement into a testimonial statement.[12]

That the "functionally equivalent" test provides no meaningful boundaries is illustrated by the recent expansion of the proposed test. For example, the petitioner in *Crawford* suggested that testimonial statements should include "*ex*

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[12] For example, a defendant on trial for conspiracy, who is facing a "confused tangle of [intercepted] conversations," may wish to cross-examine declarants in a conversation among co-conspirators, in order to clear up "the ambiguities that so often appear in all casual conversations," including "difficulties one has in making sense of slang and dialect [that] can be compounded where conspirators use private codes." *United States v. Inadi*, 475 U.S. 387, 405 (1986) (Marshall, J., joined by Brennan, J., dissenting). But the desirability of cross-examination does not render co-conspirator statements testimonial under the Confrontation Clause.

parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements *that declarants would reasonably expect to be used prosecutorially*." *Crawford*, 541 U.S. at 51 (citing Brief for Petitioner 23) (italics added). The petitioner in *Crawford* also indicated that "spontaneous declarations" or "excited utterances" would not be excluded by this test, and that they would pose ". . . purely a hearsay question. . .". Tr. of Oral Argument, Argument of Petitioner, 2003 WL 22705281, at 20-21.

Although purporting to define the same "functional equivalent" test, Petitioner Davis describes this test in much broader terms. Under the earlier proposal, a statement would be testimonial if it was "similar" to affidavits, custodial examinations, and the like. *See Crawford*, 541 U.S. at 51 (citing Brief for Petitioner 23). That limiting principle is missing from the current proposal. Also, the earlier proposal turned on whether declarants would reasonably expect a statement to be used *prosecutorially*. Now the proposal is that a statement is testimonial if "a *reasonable declarant* would have *anticipated* that her statement might be used for *law enforcement purposes*." Petitioner's Brief at 41 (final italics added).[13] Clearly, "law enforcement purposes" is much broader than "prosecutorially." "Prosecution" is ordinarily understood to mean trial use, whereas "law enforcement purposes" is considerably more open-ended, and presumably

[13] Petitioner's proposal is likewise broader than the proposal made by the National Association of Criminal Defense Lawyers in *Crawford*, who argued that testimonial statements should include "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use *at a later trial*[.]" *Crawford*, 541 U.S. at 52 (citing Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae 3*) (italics added).

encompasses investigation. Moreover, "*expect* to be used" has now been broadened to "*might* be used."

No explanation is offered for broadening this test, nor is any reason for its expansion immediately obvious. It is not clear why a declarant becomes a "witness" in the constitutional sense—and pursuant to a constitutional provision that secures trial rights—simply because he has given a statement to police, not knowing that it will be used at trial, but knowing that it will be used to advance an investigation.

Additionally, Petitioner's test is too broad insofar as it encompasses statements made to citizens, not just to police officers. Petitioner's Brief at 23 (noting that statements made to "private parties" were excluded historically) There is no constitutional justification for such a rule. The focus of Confrontation Clause analysis has always been on statements made to "authorities." Roger W. Kirst, *Appellate Court Answers to the Confrontation Questions in Lilly v. Virginia,* 53 Syracuse L. Rev. 87, 105 (2003). "The Confrontation Clause is designed to limit state misconduct and manipulation, not private trickery." Amar, *Reply to Professor Friedman*, 86 Geo. L. J. at 1048.

Apart from its elasticity, the Petitioner's test is untethered to the constitutional text or history. If the Confrontation Clause guarantees the opportunity to confront a "witness against" the accused, and if "witness against" is understood to mean a person who will testify at trial, then there seems to be no constitutional justification for including investigative use as a part of the test. If any form of the "reasonable declarant" test is used, the reasonable expectations of the declarant should be tied to an expectation that her statement will be used at trial, as a substitute for live testimony.

C. The Definition Of "Testimonial" Should Not Turn On The Declarant's State Of Mind.

The centerpiece of Petitioner's definition of a testimonial statement is his focus on whether an objectively reasonable declarant would have known that her statement might be used in a police investigation, or at trial. This focus is a critical defect in his proposal and will prove unworkable.[14]

Moreover, the assumptions that underlie this test are flawed. The test appears to have its roots in a law review article wherein the authors argued that callers to 911 "know" that the information they provide, and even the statements they give, likely will be used in prosecution of a crime. Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. Pa. L. Rev. 1171, 1181 (2002). The authors concluded that a statement should be considered "testimonial" for purposes of the confrontation right if "[a] reasonable person in the position of the declarant would realize that such information would likely be used in a criminal investigation or prosecution." *Id.* at 1242.

The authors supported their assumptions about what callers to 911 "know" with a lengthy account of public efforts in recent years to make victims of domestic violence aware that "their complaints will be taken seriously and that protective and punitive action to assist them will follow issuance of the complaint." *Id.* at 1195, 1193-1200. They concluded that "these 911 callers realize they are creating evidence for the prosecution as they call." *Id.* at 1199.

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[14] Respondent recommended a test to the Washington Supreme Court that attempted to decipher, by objective evidence, the subjective intent of the caller. *See* Answer to Brief of Amicus WACDL at 10-16. That recommendation was made a few months after *Crawford* was decided. Upon further research and reflection, Respondent believes that approach ill-advised, and instead recommends the test set forth in this brief.

There are several problems with these assumptions. First of all, it is illogical to attribute "objectively reasonable" thoughts or expectations to the typical 911 caller. Many, if not most, of these calls are made in the midst of, or in the immediate aftermath of, a highly distressing event. There is thus little time for calm reflection on what may happen over the ensuing months. [15]

Moreover, this picture of the all-knowing caller to 911 assumes that, in our diverse society, all share knowledge equally, and understand it uniformly. The authors of the article themselves hint at the fallacy in this construct when they report: "There is evidence, however, that not every segment of the population avails itself of the [911] service equally. In one New York study, African-American participants expressed the view that reporting batterers to the police was a breach of loyalty." *Id.* at 1196 n.89. This leads one to question, then, whether subsets of 911 callers might also have differing expectations of what will happen when they call 911. Might one's expectations of the police response be different depending on the type of neighborhood one lives in? Might various racial, ethnic and socioeconomic subgroups have varying expectations as to the likelihood of prosecution? Might recent immigrants have outright misconceptions about the likelihood of arrest or prosecution, based on experiences in their countries of origin? Must the courts then develop a different "objectively reasonable 911 caller" profile for each

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[15] *See United States v. Arnold*, 410 F.3d 895, 913 (Sutton, J., dissenting) ("[I]t does not seem unduly speculative to conclude that the state of mind of few 911 callers faced with an imminent threat of violence will bear the collected features that the Court has ascribed to 'testimonial' evidence—namely, a `solemn declaration or affirmation made for the purpose of establishing or proving some fact' in a court of law. *Crawford*, 541 U.S. at 51. One can only admire the presence of mind of a 911 caller who feels that way."), *vacated and superseded on other grounds*, ___ F.3d ___, 2005 WL 3315297 (6th Cir. 2005).

of these groups before they can determine what statements are truly "testimonial"?

And what happens to such profiles as legal standards evolve? For example, if this Court were to hold, as Petitioner urges, that statements made during the course of a 911 call can never be used at trial, the "objectively reasonable 911 caller" would presumably, over time, acquire this knowledge. Would these statements then become "non-testimonial"?

Another assumption inherent in the proposed test is that callers to 911 give their statements to police "knowing" that the statements can be used in lieu of their live testimony, and that they will thus never have to appear in court. *See People v. Cortes*, 781 N.Y.S.2d 401, 415 (N.Y. Sup. 2004) ("Indeed, callers knowing how the information will be used, often refuse to disclose their identity."). A perhaps more common, or at least equally likely, perception is that, if one gives a statement to police, one can expect a subpoena, and time lost from work to give testimony in court. At bottom, it is not realistic to assume that the typical caller to 911 has any idea of the limitations on the admissibility of hearsay at trial, the exceptions to the general prohibition on hearsay, or the reach of the Confrontation Clause.

A test based on so many faulty assumptions will not aid the courts in determining what statements are truly "testimonial" when the right of confrontation is at issue. Indeed, Justice Thomas foresaw problems in applying such a test, and concluded that "[a]ttempts to draw a line between statements made in contemplation of legal proceedings and those not so made would entangle the courts in a multitude of difficulties." *White v. Illinois*, 502 U.S. at 364 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment).

Examples of these difficulties already abound. Courts attempting to apply the "objectively reasonable declarant" test have reached inconsistent results. Moreover, some

courts, using this test, have excluded statements that bear no resemblance to those that concerned the Framers when drafting the Confrontation Clause.

In *Commonwealth v. Jackson*, No. 03-537, 2005 WL 2740579 (Mass. Super. Sept. 16, 2005) (order denying motion in limine), the trial court was faced with the Commonwealth's motion in limine to admit a tape recording of a call to 911 made by an elderly woman, Rita Lutz. *Id.* at *1. The trial court described the contents of the tape:

> The dispatcher answered, "911 line, what's your emergency?" Ms. Lutz responded, "I'm at 63 Silverbrook Road and someone just broke in my back door." The dispatcher asked a brief series of questions, eliciting that Ms. Lutz did not know the identity of the intruder, that Ms. Lutz was still in the house, and that the door was still open. The dispatcher spoke to police units; I infer that he dispatched them to the scene. He then asked further questions of Ms. Lutz, eliciting that the intruder had broken a door and entered the back porch, that she had seen a black leather jacket, and that the intruder had left through the same door and "gone into the back yard, I guess." The dispatcher again spoke to police units; I infer that he conveyed the information Ms. Lutz had provided. The dispatcher resumed questioning Ms. Lutz, eliciting that she had "a very dark back area," that the intruder had crouched down, and that she did not know whether he had seen her or not. The dispatcher informed Ms. Lutz that he wanted "to stay on the line in case someone's in the house." Ms. Lutz asked whether a particular police officer was on duty, noting that "he lives two doors down." The dispatcher informed her that the named officer was not on duty. The conversation ended when the dispatcher informed Ms. Lutz, after communication from the units dispatched, that police were "right around the corner." Ms. Lutz spoke in a tone of fearfulness, conveying concern for her safety.

Id.

Police located the defendant, wearing a black leather jacket, in the yard of a nearby house. They also located an unregistered vehicle with keys inside, containing identification belonging to the defendant as well as items later determined to have been stolen from other locations. *Id.* Ms. Lutz, who was 79 at the time of the court hearing, was unwilling to testify at trial. Without her taped statements to 911, the Commonwealth could not prove the charge of burglary. *Id.*

The trial court looked to the decision of the Supreme Judicial Court in *Commonwealth v. Gonsalves*, 833 N.E.2d 549 (Mass. 2005) *petition for cert. filed* (Dec. 21, 2005) (No. 05-8485), for the appropriate test to use in determining whether Ms. Lutz's statements to the 911 operator were "testimonial." *Jackson*, at *2. Interpreting the Confrontation Clause in light of *Crawford*, the *Gonsalves* court had set out a two-part test. *Gonsalves*, 833 N.E.2d at 555-60. Finding that Ms. Lutz's statements were not per se testimonial under the *Gonsalves* test, the court proceeded to examine whether the statements were testimonial in fact, i.e., whether "a reasonable person in Ms. Lutz's position would have anticipated their use for investigation or prosecution." *Jackson*, at *3. Applying this part of the test, the trial court found that Ms. Lutz "reported what a reasonable lay person would have recognized to be a crime, and gave the limited information she had to describe that person and his apparent location at the time of the call." *Id.* Finding that "[a] reasonable person would anticipate that such information would facilitate investigation, which might then lead to identification," the trial court concluded that Ms. Lutz's statements in the 911 call were "testimonial in fact," and thus inadmissible at trial. *Id.*

In *People v. Cortes*, the following call was made to 911:

> Operator: Police 1290. Is this emergency?
>
> Caller: I just saw a man running with a gun at 138th.

Operator: What borough?

Caller: 137 and Cypress. He had a red shirt on . . . bald head.

Operator: What borough, sir?

Caller: Pardon me?

Operator: What borough is this for?

Caller: Oh, the Bronx, sorry.

Operator: The Bronx.

Caller: Yeah, 137, 138 and Cypress. He's got a red shirt on, hispanic, bald-headed.

Operator: What direction?

Caller: Towards 138th Street and Cypress.

Operator: 138th Street and Cypress. What was he wearing?

Caller: A red shirt and he's bald-headed.

Operator: A red shirt and he's bald-headed.

Caller: Yeah.

Operator: What about the bottom?

Caller: Eh?

Operator: What about the bottom? What kind of pants? Jeans?

(Noise)

Caller: Oh, he's shooting at him, he's shooting at him.

Operator: OK.

Caller: He's shooting at him.

Operator: He's chasing the guy, right?

Caller: Yup. (Noise) You hear it?

Operator: I hear it. I hear it. OK.

Caller: He's killing him, he's killing him, he's shooting him again.

Operator: He's shooting at him or he shot him?

Caller: He shot him and now he's running. And he shot him two or three times. Yes.

Operator: Where's he running to?

Caller: He's running toward 138th Street.

Operator: Hold on, let me get a ambulance on line. Hmmm?

(Ring)

Male voice: 0709

Operator: OK. What was that?

Male: 0709.

Caller: I gotta hang up because people, people are gonna think I'm out calling the cops. And they'll think it's me.

Operator: OK. All right sir, no problem. OK. Thank you. I think I got it to relay.

781 N.Y.S.2d at 403-04.

In determining whether the statements made during this call to 911 were admissible at trial despite the fact that the caller could not be located, the court in *Cortes* canvassed various internet sites throughout the country, and concluded that callers to 911 reporting crimes are likely to know the use to which the information will be put. *Id.* at 405-06, 407. Citing an objective test, the court found that the call was testimonial because the purpose for which the information was given was investigation, prosecution, and potential use at a judicial proceeding. *Id.* at 414-15.

Other courts have grappled with the idea of an "objectively reasonable 911 caller" and come to the opposite conclusion,

finding the statements not to be testimonial. *See, e.g., People v. Corella*, 18 Cal. Rptr. 3d 770, 776 (Cal. App. 2004) (while 911 caller's statements were ultimately used in prosecution, statements made "without reflection or deliberation are not made in contemplation of their 'testimonial' use in a future trial"); *People v. Caudillo*, 19 Cal. Rptr. 3d 574, 590 (Cal. App. 2004) ("This was a classic 911 call, made immediately after a crime was committed. The caller was simply requesting help from the police by describing what she saw without thinking about whether her statements would be used at a later trial.") *rev. granted and opinion superseded*, 104 P.3d 97 (Cal. 2005).

As these examples illustrate, this Court should look with great caution on adopting an overly broad formulation of the definition of "testimonial," based on an "objectively reasonable declarant." It is easy to posit that *any* reasonable citizen speaking to a police officer would likely realize that her statements might ultimately be used in investigation of a crime or at trial. Defining "testimonial" in this way leads to the classification of virtually *every* out-of-court statement made to a police officer as "testimonial," even those which (as in the above examples) bear little resemblance to the statement at issue in *Crawford*, or to the statements that were the primary concern of the authors of the Confrontation Clause.

The primary problem with the declarant-centered approach is that the *subjective* intent of the declarant in making her statement may be difficult to discern, and the Petitioner's *objective* test for determining such intent leads to results that cannot be justified under the Confrontation Clause. Focusing instead on the *manner* in which the statement was obtained (i.e., structured questioning in preparing a case for trial, or ad hoc questioning in resolving an emergent situation), obviates the need for either a searching inquiry into a declarant's individual motives, or a "one size fits all" test for a de-

clarant's "objectively reasonable" expectations. Where a statement is given in response to structured, targeted police questioning, whether in a formal or an informal setting, the declarant will likely understand that her statements may be used in some way at trial. Nevertheless, putting the focus on the actions of the police (or other governmental actors), rather than on the motives of the declarant, will better target the type of statements that so concerned the Framers when they set out to protect the right to confrontation in our Constitution.

CONCLUSION

For the foregoing reasons, the decision of the Washington State Supreme Court should be affirmed.

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No. 05-5224

IN THE
Supreme Court of the United States

ADRIAN MARTELL DAVIS,
Petitioner,

v.

WASHINGTON,
Respondent.

On Writ of Certiorari
to the Supreme Court of Washington

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Before the State had any incentive to shy away from the true nature of McCottry's statements to the 911 operator, it told the jury that those statements constituted her "testimony" on the day she was assaulted. J.A. 81. The State, however, now contends that McCottry's "testimony" was not testimonial.

To justify this position – which, to say the least, is rather counterintuitive – the State says that an accusation is testimonial only if it resembles the kinds of statements that led to abuses during one period of history, the era of Sir Walter Raleigh. This argument lacks foundation and makes no practical sense. 911 operators, just like questioners during the Raleigh era, generate statements in part for prosecutorial use, and it is silly to contend otherwise. But to whatever extent accusations to 911 operators differ from those abused during the Raleigh era, it turns the Confrontation Clause on its head to say that while it prohibits prosecutions based on out-of-court accusations governmental agents obtain under "formal" circumstances, it allows prosecutions based on accusations agents obtain with *fewer* procedural protections in place. This Court should reject this upside-down notion and hold that statements are testimonial whenever people knowingly tell a governmental agent associated with law enforcement that someone committed a crime. The government may not evade the prohibition on trial-by-affidavit by conducting "victimless" prosecutions on the basis of accusations it obtains with even less ceremony. Either way, defendants like Petitioner are denied their right to confront their accusers.

ARGUMENT

I. 911 Interviews Share Core Characteristics With Other Types of Governmental Actions That Produce Testimonial Statements.

The State's foundational contention is that 911 operators' "police incident interviews" (J.A. 112) like the one here do not have any evidence-producing function akin to the

governmental interviews abused during the Raleigh era. Resp. Br. 24-26. This contention is willfully blind to reality.

The entire recent practice of "victimless," or "evidence-based," prosecutions is premised on using statements to 911 operators and responding officers, instead of live testimony, to prove "elements of [crimes], such as the identification of the assailant." American Prosecutors Research Institute, *Non-Participating Victim*, at 4-9 <http://www.ndaa-apri.org/apri/programs/vawa/nonparticipating_victim.html> (last visited March 1, 2006). The State's *amici* in this very case describe this evidence as "critical." Nat'l Network to End Domestic Violence Br. 58a; *see also id.* at 20a ("key"); *id.* at 22a ("prosecutors rely to a very great extent on the existence of 911 tapes"); American Prosecutors Research Institute, *Creative Prosecution*, at 4 <http://www.ndaa-apri.org/apri/programs/vawa/creative_prosecution.html> (last visited March 1, 2006) (911 tapes are "key pieces of evidence").

Even though this evidence is so useful, the State nevertheless asserts that its agents do not try to seek it out. Resp. Br. 24-26. The United States similarly claims that when 911 operators conduct police incident interviews or responding officers arrive at the scene of suspected crimes, "[r]esponsible officials can be expected to be focused on averting harm as their prime goal, rather than generating evidence for trial." U.S. Br. 6. Thankfully, this Court need not engage in speculation on this matter. The law enforcement community's own publicly available training materials demonstrate that during initial contacts with crime victims, agents consciously generate evidence for use in ensuing prosecutions. This is especially so when, as here, agents are "responding to [allegations of] domestic abuse," where "police and prosecutors . . . often proceed in their investigations and prosecutions with the assumption that the victim will not be available" to testify at a trial. American Prosecutors Research Institute, *Non-Participating Victim*, *supra*, at 4; *accord* Officer Navin Sharma, et al., *Domestic Violence, Break the Silence, Break the*

Cycle, at 10-22 <http://www.doh.wa.gov/hsqa/emstrauma/OTEP/domviolence.ppt> (last visited March 1, 2006) (Washington State training power-point).

Recommended protocols funded by the U.S. Department of Justice's Violence Against Women Grants Office are informative. One protocol advises that 911 dispatchers dealing with domestic violence calls should "expect victims to recant *so collection of evidence should begin at the communications level*. [Dispatchers should] [d]etermine the details of the threat, injury, crime, how injury occurred, why it occurred, *who committed it*." Administration of Justice Studies Program, Mesa Community College, *Law Enforcement Response to Violence Against Women* <www.mc.maricopa.edu/dept/d52/ajs/vaw/911.htm> (emphasis added). The protocol further explains:

> • An excited utterance statement recorded on a 911 call . . . can be an important prosecutorial tool. Because the victim may not appear for trial or may appear and change their statement, it is important to record words made by the victim that qualify as an excited utterance.
>
> . . . .
>
> • Do not try to immediately calm the victim down. Allow the victim to continue talking in order to preserve the excited utterance exception. . . .

Id.; *see also* U.S. Dep't of Justice, Office on Violence Against Women, *Assessing Justice System Response to Violence Against Women: A Tool for Law Enforcement, Prosecution and the Courts to Use in Developing Effective Responses* (1998) <http://www.vaw.umn.edu/documents/promise/pplaw/pplaw.html#id73537> (911 operators should "[r]ecord the victim's excited utterances" and tell her to preserve physical evidence). The American Prosecutors Research Institute (the research arm of *amicus* National District Attorneys Association), and other

law enforcement authorities urge similar protocols.[1] Parallel protocols – as petitioner Hammon presumably will elaborate – direct responding officers to take the same kinds of measures.[2] And domestic violence groups appearing here as *amici* forthrightly confirm that they train and collaborate closely with law enforcement agencies to develop these evidence-gathering techniques supporting victimless prosecutions. Nat'l Network To End Domestic Violence Br. 8a, 10a, 11a, 15a, 16a, 20a, 23a-24a, 26a-27a, 28a, 29a, 32a.

It does not matter whether 911 systems were designed specifically for the purpose of generating evidence for trial. The Marion statutes were not developed for that purpose. *See Crawford v. Washington*, 541 U.S. 36, 44 (2004). But both mechanisms may be used that way. Nor is anything in this description of law enforcement policies – a form of which was

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[1] *See* Erin Leigh Claypoole, *Evidence-Based Prosecution: Prosecuting Domestic Violence Cases Without a Victim*, 39 Prosecutor 18, 20 (Feb. 2005) (advocating "training . . . the dispatchers who take 911 calls from domestic violence victims" because "[o]ne of the most helpful pieces of evidence in an evidence-based prosecution is the 911 call of a scared, crying victim"); Victor I. Veith, *Investigating Domestic Violence: A Call to Protect and Serve Our Families*, 2 Protocol No. 1, at 3 (1997) <http://www.idaho-post.org/JW/Protocol/Protocol_Oct97.pdf> ("officers and prosecutors need to include in their protocols a mechanism to preserve 911 calls" because such calls can constitute "excited utterances" that may allow "the prosecutor's case [to] survive even if the victim recants or otherwise becomes uncooperative with the government").

[2] *See, e.g., People v. Ruiz*, 2004 WL 2383676, at *9 (Cal. App. 2004) (not officially published) ("California police officers are well trained . . . to be vigilant in recording complete statements" of initial encounters with victims "and to record the witnesses' statements in their reports so that the statements may later support a victimless prosecution."), *review granted* (Cal. 2005); American Prosecutors Research Institute, *Non-Participating Victim*, *supra*, at 7 (admonishing that "the excited utterance exception is lost if, when law enforcement arrive on the scene and encounter the hysterical victim who has recently been beaten, the police calm the victim down before getting her statement").

followed in this case (*see* J.A. 112-15) – meant to impugn the salutary objectives of officials seeking to identify and document criminal conduct. This is what 911 operators and other agents associated with law enforcement should do. Such evidence can be used to aid criminal investigations, to support arrests of suspects, and at trials when declarants testify. Even when no criminal case is pursued, "excited utterance" accusations can be used in civil proceedings such as child custody disputes, requests for no-contact orders, and tort actions for damages. All the Confrontation Clause provides is that such out-of-court accusations cannot be used in place of live testimony in criminal prosecutions.

II. To the Extent 911 Reports Are Less Formal Than Accusations to Magistrates During the Raleigh Era, Using 911 Reports Poses a *More* Serious Threat to the Confrontation Clause.

The State, as well as its *amici*, argue that the Framers intended the Confrontation Clause to prohibit only a particular set of abuses from "the Sir Walter Raleigh era," when governmental agents "produce[d] evidence through an interrogation of suspects and witnesses in a manner that shaped such evidence to suit the needs of prosecution." Resp. Br. 8. This argument misconceives the true nature of the right to confrontation and leads to incongruous results.

A. The State Misconceives the True Nature of the Right to Confrontation.

This Court does not generally follow an "abuses only" approach when determining the scope of constitutional criminal procedure rights. *See, e.g., Smith v. Massachusetts*, 125 S. Ct. 1129, 1133-34 (2005) (Double Jeopardy Clause applies to judicial acquittals even though it developed only to safeguard jury acquittals); *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (Fourth Amendment applies to technological

surveillance even though such practices were not used prior to the Framing); *Jones v. United States*, 526 U.S. 227, 244 (1999) (Sixth Amendment – through what became *Apprendi* rule – applies to "sentence enhancements" even though "the scholarship of which we are aware does not show a question exactly like this one was ever raised and resolved in the period before the Framing"). There is no reason here either to follow such a cramped approach to constitutional law.

1. "The right to confront one's accusers is a concept that dates back to Roman times," and that was firmly planted in the common law long before Raleigh's trial. *Crawford*, 541 U.S. at 43. Raleigh himself explained that "[t]he Proof of the Common Law is by witness and jury." *Id* at 44 (quoting *Raleigh's Case*, 2 How. St. Tr. 1, 15-16 (1603)). Blackstone and Hale likewise spoke of the right to confrontation not simply as a prohibition against any particular practices, but as a positive requirement that accusers give their testimony in court, so that cross-examination can occur and the jury can "have an opportunity of observing the quality, age, education, understanding, behavior, and inclinations of the witness." 3 William Blackstone, Commentaries on the Laws of England 373-74 (1768); Matthew Hale, The History of the Common Law of England 164 (Charles M. Gray ed. 1713) (right requires "personal appearance and Testimony of Witnesses"). This Court consistently has characterized the right this way as well. *See, e.g., Lee v. Illinois*, 476 U.S. 530, 540 (1986) (Confrontation Clause ensures that "the accused and the accuser engage in an open and even contest in a public trial").

It thus stands logic on its head to suggest that "the 'accusers' that the Confrontation Clause contemplates" were limited to "*formal accusers* (as in Raleigh's case)." U.S. Br. 6 (emphasis added). The whole point of the right to confrontation was (and is) to ensure that accusations are leveled in "a public and solemn trial," subject to adversarial testing. 3 Blackstone, *supra*, at 373. That is why this Court in *Crawford* found it "implausible that a provision which concededly

condemned trial by sworn *ex parte* affidavit thought trial by *unsworn ex parte* affidavit perfectly OK." 541 U.S. at 52 n.3. It is equally implausible, as a more general matter, that a provision that excluded extrajudicial accusations obtained in formal settings (that is, with some, but not all, procedural protections present) would now admit accusations obtained by governmental agents under *no* sense of formality or "solemn[nity]," 3 Blackstone, *supra*, at 373.

Put another way, the "abuses" during the 16th and 17th centuries occurred only because the Crown thought it could encroach, through a veneer of formality, upon the common-law requirement that criminal accusations be leveled in solemn court proceedings. No one dared even suggest that the government could prosecute criminal cases based on accusations it obtained under supposedly informal circumstances. As Chief Justice Marshall later wrote, "I know not why . . . a man should have a constitutional claim to be confronted with the witnesses against him, if *mere verbal declarations*, made in his absence, may be evidence against him." *United States v. Burr*, 25 F. Cas. 187, 193 (C.C. Va. 1807) (emphasis added).

2. The State's related idea that the Confrontation Clause applies only when governmental agents have the opportunity to "manipulate or shape" a declarant's statement (Resp. Br. 21) is equally misguided. The right to confrontation always has applied to statements that the government never had a chance to "manipulate or shape." The right, in fact, existed long before governmental investigators existed. It also traditionally has applied to "voluntary affidavit[s]." 1 Thomas Starkie, A Practical Treatise of the Law of Evidence and Digests of Proofs, in Civil and Criminal Proceedings 267 (1826); *accord* Lord Chief Baron Geoffrey Gilbert, The Law of Evidence 61 (1805). It would apply today to an unprompted letter someone mailed to a prosecutor or to an uninterrupted statement at a police station accusing someone of committing a crime.

The reason why the Confrontation Clause applies in all these situations is because "[t]he right to confrontation is basically a *trial right*," not something that regulates police practices. *Barber v. Page*, 390 U.S. 719, 725 (1968) (emphasis added); *cf. Mayle v. Felix*, 125 S. Ct. 2562, 2572-73 (2005). Police and other governmental agents do absolutely nothing wrong when they ask victims to describe what happened and who hurt them. This is what law enforcement agents are *supposed* to do. They are supposed to obtain information from people reporting crimes in order to determine who wrongdoers are, and so that wrongdoers can be arrested and brought to justice. The more "thorough," "structured [and] targeted" the agents' questions are, Resp. Br. 20-21, the better.

The same conceptual problem infects the United States' insistence on separating supposedly "emergency" situations from other circumstances under which governmental agents obtain accusatorial statements. Such a distinction can be important with respect to constitutional provisions that regulate the way governmental agents gather evidence. *See, e.g., United States v. Banks*, 540 U.S. 31 (2003) (Fourth Amendment's knock-and-announce rule); *New York v. Quarles*, 467 U.S. 649 (1984) (*Miranda* warnings). But the Confrontation Clause has nothing at all to say about how governmental agents interact with crime suspects or witnesses. The Confrontation Clause is concerned only with the method by which the prosecution proves cases in court. And in that respect, cross-examination is vital not just to curb potential governmental manipulation but also to "sift out the truth," 3 Blackstone, *supra*, at 373, with respect to completely voluntary or unfiltered testimony.

3. Once the right to confrontation is properly understood, it comes as no surprise that neither the State nor any of its *amici* can point to *one single case* (putting aside the "one deviation" of dying declarations, *Crawford*, 541 U.S. at 56 n.6) prior to the Founding or in the several decades that followed in which a prosecutor in a criminal trial was allowed to introduce

a nontestifying witness's accusatory statement made to a governmental agent.[3] There cannot be any doubt that such statements then, as today, would have been powerful prosecutorial evidence and would have allowed many prosecutions to proceed in the absence of victim testimony. But when the victim failed to appear for trial, the case was simply dismissed; "[w]ithout the accuser there could not even be a prosecution." Leonard W. Levy, Origins of the Fifth Amendment 29 (1968). Indeed, the closest analog to the statement in this case, a "hue and cry" to a local constable, was not even admissible in a *pretrial* hearing to detain a defendant pending trial. *See* Petr. Br. 20.

4. Because all of the historical authority that is most closely on point favors Petitioner, the State focuses on the collection of cases during the 19th century excluding accusatory statements *to private parties* (*see* Petr. Br. 23-29), and argues that these cases are irrelevant because they rest solely on hearsay law. The State further protests that the scope

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[3] What is more, neither the State nor any of its *amici* can point to a single criminal case in America before the much criticized *State v. McPike*, 3 Cush. 181 (Mass. 1849), or in England before the much-criticized *Rex v. Foster*, 6 Car. & P. 325 (1834), in which a nontestifying victim's accusatory statement *even to a private person* was validly admitted in a criminal case. *See* Petr. Br. 25-26 & n.5. The United States cites two cases from the Old Bailey Session Papers that supposedly show that such statements were admissible. *See* U.S. Br. 25 n.4. But the accusatory statement in *Rex v. Salter* was made on the victim's "death-bed," and thus was obviously a dying declaration. *Id.* at 330 <http://www.oldbaileyonline.org/html_units/1750s/t17550910-29.html>. The statement in *Rex v. Matthews* was not even accusatory; it simply described for purposes of medical treatment how the declarant had been injured. *Id.* at 152-53 <http://www.oldbaileyonline.org/html_units/1750s/t17550409-12.html>. The NACC brief (at 19-21) mentions other Old Bailey cases involving children's statements to family members, but the King's Bench implicitly disapproved these cases in *King v. Brasier*, 1 Leach 199 (K.B. 1779). There, the full King's Bench held that children's out-of-court accusations were admissible *only if they testified*. *Id.* at 200. Since the victim there had not been, in fact, "sworn or produced as a witness at trial," her accusatory statement was inadmissible. *Id.*

of Founding-era hearsay exceptions sheds no light on the scope of *Crawford*'s testimonial principle. Resp. Br. 28-32. Neither of these arguments holds up.

The development of the *res gestae* doctrine was *not* shaped solely by hearsay law. As Petitioner already explained, the doctrine's strict prohibition against admitting reports of past criminal conduct developed, especially in criminal cases, in significant part to avoid treading on the right to confrontation. *See* Petr. Br. 26-29. Indeed, the predominant reason courts invoked to exclude such statements was one that the United States labels a "central feature" of statements implicating confrontation concerns: that they were "nothing more than a weak version of live testimony." U.S. Br. 5, 18; *compare* 3 Simon Greenleaf, A Treatise on the Law of Evidence § 124, at 148 (1842) (reports outside *res gestae* inadmissible because such declarants are "not subject to the ordinary tests enjoined by the law for ascertaining the correctness and completeness of testimony," namely "oath" and "cross-examination"); *Brasier*, 1 Leach at 199-200 (characterizing out-of-court statement describing recent assault as "testimony" given under inadequate safeguards); Petr. Br. 26-27 (collecting other authorities).[4] Even when courts excluded

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[4] The State's *amici* are correct – as Petitioner already pointed out, *see* Petr. Br. 31 – that in the latter part of the 19th century some courts began to admit statements describing recently completed criminal conduct. *See* U.S. Br. 25; Br. for Illinois, et al. at 16. But none of these decisions involved statements to agents of law enforcement, a situation that brings the Confrontation Clause "unique[ly]" into play. *Crawford*, 541 U.S. at 56 n.7; *see also id.* at 53. And all of the courts upheld the admission of the statements based on perceived reliability – not on the traditional *res gestae* basis that they were part of the event itself. *See, e.g.*, Petr. Br. 31; *People v. Del Verno*, 192 N.Y. 470, 487 (1908) (emphasizing distinction between declarations that constitute part of the transaction itself and those describing recently completed conduct; upholding the admission of a statement in the latter class because of the "great improbability that the [statement] should be false"). Accordingly, their reasoning could not be used to turn back a Confrontation Clause objection. *Crawford*, 541 U.S. at 61.

such statements because they were not made under oath, *see* Resp. Br. 31, this amounted to the same complaint because *testimony* (and only testimony) is supposed to be given under oath. *E.g., Maryland v. Craig*, 497 U.S. 836, 845-46 (1990). It would not make any sense to complain that a co-conspirator statement or a family-history record was not made under oath.

None of this, of course, is to suggest that hearsay law in criminal cases was (or is) coextensive with the right to confrontation. These are distinct doctrines that serve different purposes. But as this Court repeatedly explained in *Crawford*, the scope of hearsay exceptions in 1791 sheds light on the testimonial principle, because the law at that time would not have condoned an exception that "admit[ted] *testimonial* statements against the accused in a *criminal* case." 541 U.S. at 56 (emphasis in original); *see also id.* at 58 n.8 (invoking this reasoning with respect to spontaneous declarations).[5] This supposition is especially forceful when, as here, contemporaneous authorities refused to extend a hearsay exception in criminal cases expressly to avoid impairing the right to confrontation.

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[5] This emphasis on *criminal* cases makes clear that neither *Thompson v. Trevanion*, Skin. 402, 90 Eng. Rep. 179 (K.B. 1694), nor *Aveson v. Kinnaird*, 6 East. 189, 193, 102 Eng. Rep. 1258 (1805), cited by *amici*, is informative regarding the scope of right to confrontation during the Founding period. But even if these cases were relevant, neither would help the State here. Even assuming, contrary to the prevailing understanding in early treatises (*see* Petr. Br. 30), that the statement in *Thompson* was admitted in the declarant's absence for the truth of the matter asserted, it apparently was part of the *res gestae*, not a report of a completed event. *See* Petr. Br. 30. The statement in *Aveson* was admitted because it described medical symptoms and because it was an admission against interest, not something "mean[t] to criminate." 6 East. at 195-97 (Lord Ellenborough, C.J. & Lawrence, J.). Neither *Thompson* nor *Aveson* remotely suggest that reporting a crime to a governmental agent associated with law enforcement could have been deemed admissible. Nor did any other Founding era civil case. Thus, contrary to the United States' suggestion (U.S Br. 27), there would have been no need for cases during that period to distinguish between civil and criminal cases with respect to the *res gestae* doctrine.

B. The State's Specific Arguments for Excluding McCottry's Statement from the Ambit of the Confrontation Clause Are Unavailing.

All that is necessary to decide this case is to hold that McCottry's statements accusing Petitioner of assaulting her are testimonial because they were knowingly made to a governmental agent associated with law enforcement accusing someone of committing a crime. The State argues, however, that (1) accusatory statements are not testimonial unless "questioning [producing them] is done by a governmental official with a primarily investigative function who, acting in his investigative capacity, conducts a structured interrogation, under circumstances where the investigator could manipulate or shape the witness's statement into something that resembles trial testimony," Resp. Br. 20-21; (2) it is improper to focus, even as a backstop to historical authority and inferences, on whether a reasonable declarant reporting a crime to a 911 operator would anticipate her statements would be used prosecutorially. Neither of these arguments withstands scrutiny.

1. None of the four components of the State's proposed rule advance its cause. Nor do any of them find any support in the text, history, or purpose of the Confrontation Clause.

First, the State's focus on agents' "investigatory" actions has no purchase here. All governmental agents associated with law enforcement, including 911 operators, are duty-bound to pass criminal accusations onto prosecutorial authorities. That is more than enough to implicate the Confrontation Clause, just as it is more than enough to implicate the Self Incrimination Clause. *See Grosso v. United States*, 390 U.S. 62, 66-67 (1968) (statement is testimonial if declarant "may reasonably expect [it] would be provided to prosecutorial authorities").

Second, the State's insistence on "structured" questioning is a red herring. The State never disputes that the questioning here was, indeed, "structured." The 911 operator followed "almost exactly" a detailed policy for obtaining information in

"police incident interviews." J.A. 135 n.5 (Sanders, J., dissenting); J.A. 112-15. The operator asked twenty-six questions over the course of the interview; implored McCottry to "listen carefully"; and once even interrupted her to demand that she "[s]top talking and answer my questions." J.A. 8-13.

In any event, it does not matter whether a governmental agent proffers "structured" questions in obtaining an out-of-court accusation. For starters, accomplices' confessions are not always given in response to "structured" questioning. *See, e.g., Douglas v. Alabama*, 380 U.S. 415 (1965) (applying Clause to confession that was narrative in nature). Even two of Lord Cobham's statements used against Sir Walter Raleigh were given in the absence of structured questioning. One statement was a letter Cobham "voluntarily" wrote himself; another was an accusation "exclaimed" in response to learning that Raleigh allegedly had betrayed him. *See Trial of Sir Walter Raleigh*, 1 Jardine's Criminal Trials 389, 415, 444-46 (1832). Yet it always has been agreed that introducing such a nontestifying accomplice's confession constitutes a "paradigmatic confrontation violation." *See Crawford*, 541 U.S. at 52.

Statements obtained under the Marion statutes were not always given in response to structured questioning either. Those statutes required justices of the peace to "take the *examination* of the said Prisoner and the *information* of them that bring him." 1 & 2 Phil. & M., c. 13 (1554), and 2 & 3 c. 10 (1555) (emphasis added). Thus, magistrates apparently often simply received "information" from the accusers; no "examination" was even contemplated. Yet here as well, there is no dispute that statements obtained in this manner were testimonial. *Crawford*, 541 U.S. at 46-47.

This, of course, makes eminent sense. In run-of-the-mill criminal prosecutions, such as this one, all the information "essential to the prosecution of [a] case" (J.A. 128) often can be obtained by one question – "who did it?" – or just a few more. At trials themselves, prosecutors often ask victims only a handful of questions along the lines of, "and then what

happened?" The relevant inquiry, therefore, is not what kinds of questions are asked but what kinds of answers are given.

Third, the State's insistence on an "interrogation" does it no good. The State contends that questioning does not amount to interrogation unless it is "formal" and "thorough." Resp. Br. 20. But this Court in *Crawford* emphasized that it was using the term "interrogation" in its "colloquial, rather than any technical, legal sense," and it cited to *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980). *See Crawford*, 541 U.S. at 53 n.4. This suggests that interrogation, at a minimum, includes "express questioning or its functional equivalent" – that is, "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response." *Innis*, 446 U.S. at 300-01. Asking an assault victim who assaulted her easily meets this standard.

In any event, it does not matter whether a governmental agent "interrogates" a declarant. Nothing in Fifth Amendment law limits the realm of testimonial statements to those produced during interrogations. Nor does anything in *Crawford*. To the contrary, *Crawford* says repeatedly that statements made during police interrogations are part of a class of "paradigmatic" or "core" testimonial statements, 541 U.S. at 52, 63, indicating that other types of statements also are testimonial. *See also id.* at 68. *Crawford* also stated, without referring to any "interrogation" requirement, that the statements the alleged victim in *White v. Illinois* made "to an investigating police officer admitted as spontaneous declarations" were "testimonial statements." *Id.* at 58 n.8.

The State essentially admits that its "interrogation" rule cannot be squared with this description of *White*. Resp. Br. 22 n.9. And there is no doubt the State's test also would mean that a person could go to a police station to report a crime and, so long as officers did not interrupt to ask questions, the complainant's accusation would not be testimonial. *See* Cal. Evid. Code § 1370 (new *Roberts*-era statute allowing admission of such statements); Or. Rev. Stat. § 40.460 (same);

State v. Barnes, 854 A.2d 208, 211 (Me. 2004) (post-*Crawford* decision allowing use of such a statement because complainant was not "interrogated"). This result is difficult to square with any sensible view of the Confrontation Clause.

The State's emphasis on the lack of thoroughness in the operator's interview in this case (Resp. Br. 26) is especially perverse. The operator's questioning established all of the elements of the crime the State charged. *See* J.A. 81-82 (prosecutor summarizing 911 tape for the jury). The only manner in which the operator's questioning was *not* thorough was with respect to potential lines of cross-examination, such as who exactly "Mike" (the other man allegedly present) was and whether he might have been the one who assaulted her. *See* Petr. Br. 37; J.A. 10-11, 136 n.7 (Sanders, J., dissenting). It cannot possibly be that that kind of governmental "brevity" (Resp. Br. 26) in questioning excludes out-of-court accusations from the ambit of the Confrontation Clause.

Fourth, it does not matter, as described *supra* at 5-8, whether the government obtains an accusation in a way allowing it to generate "something that resembles trial testimony." Resp. Br. 20-21. Even if such a requirement existed, the State here, quite correctly, explained to the jury that the audio recording that the 911 operator's questions produced did not just resemble trial testimony; it actually amounted to McCottry's "testimony on the day that this happened." J.A. 81. Nothing more need be added to the State's own words.

2. To the extent that historical traditions and inferences leave any question whether McCottry's accusation that Petitioner assaulted her was testimonial, the fact that a reasonable person in her position would have anticipated that her statement would be used prosecutorially confirms that it was. Although the State asserts that this generalized "reasonable declarant" test lacks any textual basis (Resp. Br. 30), it flows directly from the Confrontation Clause's words "witness against." One needs to interpret those words functionally, since defining them to refer only to in-court

testimony would elevate form over substance, rendering the Clause "powerless to prevent even the most flagrant inquisitorial practices." *Crawford*, 541 U.S. at 51. And, functionally speaking, a person is a witness against another – just as this Court has long held she is a "witness against" herself under the Fifth Amendment – when providing information she "reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar v. United States*, 406 U.S. 441, 445 (1972); *see also Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 189-91 (2004) (terming such statements "testimonial"); *United States v. Hubbell*, 530 U.S. 27, 34-38 (2000) (same); *id.* at 55 n.5 (Thomas, J., concurring) (drawing parallel between Fifth Amendment and Confrontation Clause).[6]

In contrast to the State's multi-pronged balancing test, this rule also is easily administrable. Once this Court establishes whether a reasonable person would anticipate that reporting a recent crime to a governmental agent would be used prosecutorially, lower courts will be able to implement that rule without difficulty. By contrast, the State's proposed test – to borrow Justice Thomas' words – would present a "multitude of difficulties." *White v. Illinois*, 502 U.S. 346, 364 (1992) (Thomas, J., concurring in part and concurring in the judgment). In every case, courts would have to determine, among other things, whether the governmental agent who obtained the statement was "acting in his investigative capacity"; whether he conducted "structured," "targeted," "thorough," and "formal" questioning; and whether the circumstances gave rise to a danger of "manipulat[ion]." Resp. Br. 20-21. One sees no end to such litigation.

The State and the United States also maintain that a reasonable person calling 911 to report a crime would not

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[6] The State's attack on the objective nature of the reasonable declarant rule (Resp. Br. 37-38) is nothing more than an attack on objective standards generally. This attack is inconsistent with *Kastigar* and innumerable other criminal procedure doctrines. *See* Petr. Br. 41.

believe that her statements were being taken for use "at trial," Resp. Br. 35, or "in a legal proceeding," U.S. Br. 11-14. But this frames the inquiry too narrowly. This Court has made clear that people are "witnesses" not just when they provide evidence specifically for trial but also when they understand that their statements could be used *prosecutorially* – that is, for law enforcement purposes. *See Hubbell*, 530 U.S. at 37-38; *Kastigar*, 406 U.S. at 445; *Grosso*, 390 U.S. at 66-67.[7] This recognition comports with the historical bar against using victims' "hues and cries" – which would have been no more focused on future trials than modern 911 calls – as evidence against the accused. *See* Petr. Br. 18-22. And it finds support in *Crawford*, where this Court noted that statements obtained for "investigative" reasons are testimonial. 541 U.S. at 53.

Perhaps most important, focusing on prosecutorial use instead of trial use comports with common sense. When, for example, people report crimes but say they would prefer not to press charges, they may not think their statements would be used in future trials. But such statements obviously should be treated as testimonial. As prosecutors often point out, "the decision to prosecute lies with the prosecutor and should not be usurped by . . . the victim." American Prosecutors Research Institute, *Non-Participating Victim*, *supra*, at 5. Accordingly, the Confrontation Clause is concerned with *all* accusatory statements to law enforcement agents, not just those that declarants think will be used specifically at legal proceedings.

Once the reasonable-declarant inquiry is properly framed, it is clear – and the State does not contend otherwise – that the test is satisfied here. People report crimes to 911 in order to produce a law enforcement response. They know that accusatory statements are likely to trigger arrests and the machinery

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[7] The State suggests the word "prosecutorially" is different than phrase "for law enforcement purposes." Resp. Br. 34. Petitioner conceives of both phrases as having the same meaning – namely, as evidence "in a criminal prosecution or [leading] to other evidence that could be so used," *Kastigar*, 406 U.S. at 445 – and uses the phrases interchangeably.

of the criminal justice system. That is particularly so in the context of domestic violence accusations, because state law *requires* the police to arrest suspected abusers, Petr. Br. 38-39, and "[a]ll citizens are presumptively charged with knowledge of the law." *Atkins v. Parker*, 472 U.S. 115, 130 (1985).

Contrary to the United States' assertion (Br. 14-15), this analysis does not ignore the exigent nature of 911 calls reporting recently completed crimes. No matter how upset or frenzied people are when they call 911 to report a crime, they are, of course, calling 911 – instead of their friend, family member, business colleague, or anyone else – for an important reason: they know that a 911 operator connects them to the police, the agency charged with enforcing the criminal laws. That knowledge is sufficient to make such declarants' accusations testimonial, even if they are not "focused on . . . providing evidence" (U.S. Br. 16) at the time.

Creating an exception for accusations made in response to supposedly "emergency questioning" would open a gaping hole in the Confrontation Clause. The United States says that a statement providing "the identity of a person who may pose a current danger" satisfies its emergency test. U.S. Br. 29. It also says that a statement obtained at the scene in order to decide whether to arrest a suspect satisfies its test. U.S. Br. in *Hammon* at 13. There is no temporal limitation on either of these proposed rules. Nor does a statement even appear to have to come from a victim. Presumably, then, every time a person calls 911 or tells the police that someone who is still at large committed a felony – or at least a violent crime – that statement would not be testimonial. Calling 911 to say that John Doe committed two rapes over the past week certainly would identify "a person who may pose a current danger." U.S. Br. 29. So would telling that to the police in person. The government, in short, always would be able prosecute defendants based on first reports instead of producing accusers in court. This cannot be squared with the history of the Confrontation Clause or its true nature as a trial right.

III. Adopting the State's Position Would Demolish Our System of Adversarial Justice With Respect to Prosecuting a Broad Array of Street Crime.

Nothing short of the adversarial process itself is at stake in this case. Washington and other states use "excited utterance" statements to governmental agents in place of live testimony not just in domestic violence cases but also in prosecuting crimes as varied as ordinary assault, carjacking, arson, robbery, kidnapping, and drug crimes. *See* Appendix A (collecting recent cases). Contrary to suggestions from the State's *amici*, this practice did not germinate until the "mid-1990's," when this Court's decision in *White* opened the door to proceeding in this manner. *See* Andrew King-Ries, Crawford v. Washington: *The End of Victimless Prosecution?*, 28 Seattle L. Rev. 301, 301 (2005); NACDL Br. in *Hammon* 27 n.16. But there is no mistaking the vigor with which prosecutors now want to try cases without putting alleged victims or other witnesses on the stand. So long as it is permissible, the American Prosecutors Research Institute predicts that "the criminal justice system will experience an ever increasing number of cases prosecuted on the basis of the excited utterance exception." American Prosecutors Research Institute, *Non-Participating Victim*, *supra*, at 9.

To this end, the Institute already has published a detailed protocol for "overcom[ing] a [*Crawford*] challenge to the introduction of excited utterances made by a victim to a police officer." Cindy Dyer, *Sample* Crawford *Predicate Questions*, 1 The Voice 8 (Nov. 2004) <http://www.ndaa-apri.org/pdf/the_voice_vol_1_issue_1.pdf>. Typical questions are: "Were your questions to her an interrogation or merely part of your initial investigation?"; "Were those questions asked in order to determine whether a crime had even occurred?"; and "At this time, did the victim make any statements to you that were not in response to any questions?" *Id.* at 8-9. Other publications likewise urge that 911 operators be trained to gather evidence "that will ultimately lead to the conviction of batterers" while

"avoid[ing] the victim's statements being classified as testimonial." Jeanine Percival, Note, *The Price of Silence: The Prosecution of Domestic Violence Cases in Light of* Crawford v. Washington, 79 S. Cal. L. Rev. 213, 254-55 (2005). Some courts already have rested decisions upon such spoon-fed testimony. *See, e.g., State v. Hembertt*, 696 N.E.2d 473, 479 (Neb. 2005) (noting that officer "agreed" with prosecutor's suggestion that the victim's statement to him "was not in response to a question that [he] or another officer asked"), *pet'n for cert. pending* (No. 05-5981); *Marc v. State*, 166 S.W.3d 767, 779 (Tex. App. 2005) ("The officers' testimony indicates that each one asked questions of a lone, visibly upset female . . . in an attempt to determine the reason for her emotional state.").

Consequently, this Court should have no illusions concerning what will happen if it affirms here. Prosecutors, in conjunction with other law enforcement agents, will be able effectively to dispense with the adversarial process with respect to prosecuting a broad array street crime. Whenever 911 operators or responding officers are able to obtain accusatory statements shortly after the events at issue without asking too many "tactically structured" questions, prosecutors will have no need to produce alleged victims at trial. *See Crawford*, 541 U.S. at 68 (unavailability need not be shown to introduce nontestimonial hearsay); *White*, 502 U.S. at 355-58 (same with respect to "excited utterances"). Nor, in many cases, will prosecutors have any such incentive. Putting witnesses on the stand runs the risk that, through cross-examination, witnesses will be corrected, impeached, or exposed as exaggerators or liars. *See* NACDL Br. in *Hammon* at 21-22. It is much easier to simply to present recorded out-of-court accusations.

The Confrontation Clause is designed to prevent just such inquisitorial trial methods. This Court should enforce it here.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Washington Supreme Court.

Respectfully submitted,

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APPENDIX A

Recent Prosecutions Outside the Domestic Violence Realm Using Nontestifying Witness's "Excited Utterances" to Governmental Agents as Substantive Evidence of Guilt

State v. Walker, 118 P.3d 935 (Wash. App. 2005) (assault)

State v. Ohlson, 125 P.3d 990 (Wash. App. 2005) (assault)

State v. Talbott, 2005 WL 2630641 (Wash. App. 2005) (assault)

People v. Cordova, 2006 WL 45878 (Cal. App. 2006) (kidnapping, carjacking, robbery, possession, battery, trespass)

People v. Morris, 2005 WL 2982137 (Cal. App. 2005) (first-degree murder), *review denied* (Cal. 2006)

People v. Soliz, 2005 WL 2746784 (Cal. App. 2005) (robbery, carjacking)

People v. Lennon, 2005 WL 957751 (Cal. App. 2005) (attempted murder, assault, shooting at an occupied motor vehicle), *review denied* (Cal. Aug. 10, 2005)

In re Bryan S., 2005 WL 977668 (Cal. App. 2005) (attempted second-degree robbery), *review denied* (Cal. July 13, 2005)

People v. Saravia, 2005 WL 295789 (Cal. App. 2005) (attempted murder), *review denied* (Cal. Apr. 27, 2005)

People v. Davis, 2004 WL 2699998 (Cal. App. 2004) (shooting at an unoccupied car)

People v. Jimenez, 2004 WL 1832719 (Cal. App. 2004) (robbery), *cert. denied*, 125 S. Ct. 1713 (2005)

People v. Martin, 2004 WL 859187 (Cal. App. 2004) (attempted second degree robbery, assault with a deadly weapon), *review denied* (Cal. 2004)

Drayton v. United States, 877 A.2d 145 (D.C. 2005) (attempted possession of a prohibited weapon and assault)

Lopez v. State, 888 So.2d 693 (Fla. App. 2004) (felon in possession of a firearm)

People v. West, 823 N.E.2d 82 (Ill. App. 2005) (aggravated criminal sexual assault, aggravated vehicular hijacking, armed robbery, kidnapping)

In the Matter of A.L. 2006 WL 9511 (N.C. App. 2006) (assault)

State v. Sutton, 609 S.E.2d 270 (N.C. App. 2005) (murder, attempted robbery, assault)

State v. Forrest, 596 S.E.2d 22 (N.C. App. 2004) (first-degree kidnapping, assault with deadly weapon, and assault), *aff'd*, 359 N.C. 424 (N.C. 2005) (per curiam)

People v. Diaz, 798 N.Y.S.2d 21 (N.Y. App. 2005) (assault)

People v. Cortes, 781 N.Y.S.2d 401 (N.Y. Sup. Ct. 2004) (attempted murder, assault, weapon possession)

People v. Conyers, 777 N.Y.S.2d 274 (N.Y. Sup. Ct. 2004) (assault and weapon possession)

People v. Dobbin, 791 N.Y.S.2d 897 (N.Y. Sup. Ct. 2004) (robbery)

State v. Williams, 2005 WL 120054 (Ohio App. 2005) (assault with a firearm)

State v. Anderson, 2005 WL 171441 (Tenn. Crim. App.), *appeal granted* (Tenn. 2005) (burglary)

Wall v. State, __ S.W.3d __, 2006 WL 119575 (Tex. Crim. App. Jan. 18, 2006) (aggravated assault)

Marc v. State, 166 S.W.3d 767 (Tex. App. 2005) (aggravated sexual assault)

Cole v. State, 2005 WL 3115555 (Tex. App. 2005) (aggravated robbery)

Davis v. State, 2005 WL 183141 (Tex. App. 2005) (capital murder)

Wilson v. State, 151 S.W.3d 694 (Tex. App. 2004) (aggravated robbery), *review refused* (Tex. 2005)

Cassidy v. State, 149 S.W.3d 712 (Tex. App.) (aggravated assault with a deadly weapon), *cert. denied*, 125 S. Ct. 1648 (2005)

Delgado v. State, 2004 WL 3093477 (Tex. Crim. App. 2004) (murder)

State v. Ballos, 602 N.W.2d 117 (Wis. App. 1999) (arson), *review denied*, 609 N.W.2d 473 (Wis. 2000)

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No. 05-5224

In the Supreme Court of the United States

ADRIAN MARTELL DAVIS, PETITIONER

v.

STATE OF WASHINGTON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether an assault victim's identification of her assailant in response to emergency questioning by a 911 operator was "testimonial" within the meaning of *Crawford* v. *Washington*, 541 U.S. 36 (2004).

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In the Supreme Court of the United States

No. 05-5224

ADRIAN MARTELL DAVIS, PETITIONER

v.

STATE OF WASHINGTON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents the question whether the rule against the admission of "testimonial" statements established in *Crawford* v. *Washington*, 541 U.S. 36 (2004), applies to statements made in response to emergency questioning. Because that question has substantial implications for the conduct of federal criminal trials, the United States has a significant interest in the Court's disposition of this case.

STATEMENT

1. On February 1, 2001, Michelle McCottry dialed 911, but hung up before speaking to a 911 operator. J.A. 117. The operator called McCottry back immediately. *Ibid.* The conversation between McCottry and the operator proceeded as follows:

911 Operator: Hello

Complainant: Hello

911 Operator:	What's going on?
Complainant:	He's here jumpin' on me again.
911 Operator:	Okay. Listen to me carefully. Are you in a house or in an apartment?
Complainant:	I'm in a house.
911 Operator:	Are there any weapons?
Complainant:	No. He's usin' his fists.
911 Operator:	Okay. Has he been drinking?
Complainant:	No.
911 Operator:	Okay, sweetie. I've got help started. Stay on the line with me, okay?
Complainant:	I'm on the line.
911 Operator:	Listen to me carefully. Do you know his last name?
Complainant:	It's Davis.
911 Operator:	Davis? Okay, what's his first name?
Complainant:	Adran.
911 Operator:	What is it?
Complainant:	Adrian.
911 Operator:	Adrian?
Complainant:	Yeah.
911 Operator:	Okay. What's his middle initial?
Complainant:	Martell. He's runnin' now.

J.A. 8-9.

In response to further questioning, McCottry told the 911 operator that petitioner had run to his car, that the car was headed out of a dead end street, and that petitioner was not alone. J.A. 9-10. After informing the operator that she did not need an aid car, McCottry told her that she had to leave the phone to close her door. J.A. 11. When McCottry returned, she told the 911 operator, in response to additional questions, that petitioner was her former boyfriend, that she was moving that day, that petitioner had come over to "get his stuff," that someone else was present when petitioner arrived, that she told petitioner to go, and that petitioner then began beating her. J.A. 11-12.

At that point, the 911 operator obtained identifying information from McCottry. J.A. 12. After obtaining that information, the operator asked McCottry whether her door was locked, and McCottry replied that it was. J.A. 13. At the conclusion of the call, the operator told McCottry that the police would check the area for petitioner first and then come talk to her. *Ibid.*

Police officers arrived at McCottry's house within four minutes of the 911 call. J.A. 117. They observed that McCottry was "very upset" and that she had fresh injuries on her forearm and face. *Ibid.* While McCottry spoke with the officers, she made hurried efforts to gather her children and belongings so that they could leave the house. *Ibid.*

2. Petitioner was charged with one count of a felony violation of the provisions of a domestic no-contact order. J.A. 117. The State presented the two police officers who responded to the 911 call as witnesses, and they testified about McCottry's injuries. The prosecutor also introduced McCottry's 911 call under the State's excited utterance exception to the hearsay rule. J.A. 118. That exception permits the introduction of "[a] statement relating to a startling event or condition made while the declarant was under the stress of

excitement caused by the event or condition." Wash. Rev. Code Ann., R. Evid. 803(a)(2) (West 2005). The State was unable to locate McCottry, so she did not testify. J.A. 118. The jury found petitioner guilty. J.A. 119.

3. The Washington Court of Appeals affirmed. J.A. 96-111. As relevant here, the court rejected petitioner's contention that the admission of the 911 call deprived him of his Sixth Amendment right to confront the witnesses against him. J.A. 96. The court reasoned that, under *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980), the admission of statements within a firmly rooted hearsay exception do not violate the Confrontation Clause, the excited utterance exception is firmly rooted, and McCottry's 911 statements were excited utterances. J.A. 98-99.

4. The Washington Supreme Court affirmed. J.A. 116-138. While the appeal was pending, this Court held in *Crawford* v. *Washington*, 541 U.S. 36 (2004), that the Confrontation Clause generally precludes the admission of "testimonial" statements unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine. Applying *Crawford*, the Washington Supreme Court considered whether McCottry's 911 call was testimonial. J.A. 124.

In resolving that issue, the Washington Supreme Court first determined that the purpose of an emergency 911 call "is generally not to 'bear witness'" but rather to obtain "help to be rescued from peril." J.A. 124. The court rejected the argument that McCottry reasonably knew that her call would later be used to prosecute petitioner, finding "no evidence that McCottry had such knowledge or that it influenced her decision to call 911." J.A. 126.

The Washington Supreme Court further held that "[a]n emergency 911 call may contain both statements which are nontestimonial and statements which are testimonial." J.A. 127. The court also noted that harmless error analysis applies

to the admission of evidence in violation of the Confrontation Clause. J.A. 127-128. Applying those principles, the court held that McCottry's initial identification of petitioner as her assailant was non-testimonial because it was part of an effort to seek assistance and protection from peril. J.A. 128. The court concluded that, to the extent other statements in the 911 call might be testimonial, their admission was harmless beyond a reasonable doubt. J.A. 128-129

Judge Sanders dissented. J.A. 131-138. Applying a standard based on whether a reasonable person would anticipate that a statement would be used in investigating or prosecuting a crime, he concluded that McCottry's 911 call was testimonial. J.A. 133-134.

SUMMARY OF ARGUMENT

In *Crawford* v. *Washington*, 541 U.S. 36 (2004), this Court made clear that the Confrontation Clause's core textual and historical concern is eliminating the civil law method of proof, which permitted the use of *ex parte* examinations as evidence against the accused. The Court's approach to determining whether an out-of-court statement infringes that core concern—and thus is "testimonial"—requires assessing whether a modern-day hearsay statement presents the type of acute dangers raised by the historical abuses that the Framers targeted.

Statements made to officials who are faced with an apparent emergency, and who ask questions reasonably necessary to resolve that emergency, are not "testimonial" statements. Three central features characterized the civil law method of *ex parte* examinations: they clearly conveyed to the declarant that he was giving statements for use in a legal proceeding; the government could readily exploit the situation to shape the statements; and the statements were only a weaker form of live testimony, without independent probative

value. Statements given in response to emergency questioning have none of those features.

In an emergency, a declarant will likely understand that the objective purpose of official questioning is to assess and resolve an immediate or imminent threat to the safety of an individual or the public. The circumstances lack the formality or structuring of inquiries characteristic of modern-day interrogation, or, most importantly, of the historical instances that prompted the Confrontation Clause. Similarly, government manipulation of the responses for prosecutorial purposes is not a general risk when public officials are seeking to resolve an emergency. Responsible officials can be expected to be focused on averting harm as their prime goal, rather than generating evidence for a trial. Finally, the immediacy and authenticity of on-the-scene statements in the midst of an emergency gives those statements a probative force that is not replicated by in-court testimony when the emergency has long passed. Statements given in an emergency thus have none of the critical features of the classic testimonial statements identified in *Crawford*: testimony at preliminary hearings, grand jury proceedings, or a former trial, or of modern, tactically structured interrogation.

Petitioner seeks to expand *Crawford*'s reach, and extend the "testimonial" category to encompass emergency statements, by misreading history. He contends that all accusations to government agents that a person committed a crime should be regarded as "testimonial." History, however, indicates that the "accusers" that the Confrontation Clause contemplates were formal accusers (as in Raleigh's case); that the sparse English case law excluding evidence of crime reports to constables was likely unavailable to the Framers, may have rested on grounds other than the common law confrontation right, and did not involve emergencies; that res gestae case law was mixed and in many cases *did* admit state-

ments identifying criminals made immediately or very shortly after an emergency; and that other cases excluding a rape victim's identification of the assailant (when she did not testify) involved no on-going emergency. This history thus furnishes no basis for excluding probative evidence stemming from emergency questioning that differs critically from the "principal evil at which the Confrontation Clause was directed." 541 U.S. at 50.

Under the proper approach, the statements made during the 911 call in this case by the victim identifying her assailant were the product of emergency questioning. The 911 operator faced an apparent emergency; and the questions were reasonably necessary to protect the safety of the victim. The Confrontation Clause's bar on "testimonial" statements has no application to such statements.

ARGUMENT

STATEMENTS THAT ARE THE PRODUCT OF EMERGENCY QUESTIONING ARE NOT "TESTIMONIAL" UNDER THE CONFRONTATION CLAUSE

The Confrontation Clause guarantees a criminal defendant the right "to be confronted with the witnesses against him." U.S. Const. Amend. VI. This Court in *Crawford* v. *Washington*, 541 U.S. 36 (2004), made clear that the "primary object" of concern under the Confrontation Clause is "testimonial hearsay." *Id.* at 53. The determination of whether a particular statement is testimonial requires a close comparison to the type of statement that formed the "principal evil" at which the Confrontation Clause was aimed. *Id.* at 50. While the formal acquisition of evidence by the government in the "civil-law mode of criminal procedure," *ibid.*, exemplifies that evil, statements taken by law enforcement officers in response to what they reasonably perceive to be an emergency do not. Responses to emergency questioning, *i.e.*,

questioning that is reasonably necessary to determine whether there is an emergency and how to respond, are therefore not testimonial, and thus not within *Crawford*'s rule against admitting such statements absent unavailability of the witness and a prior opportunity for cross-examination.

I. THE FRAMERS SOUGHT TO ABOLISH THE USE OF *EX PARTE* EXAMINATIONS AND COMPARABLE PRACTICES AS EVIDENCE AGAINST THE ACCUSED, AND EMERGENCY QUESTIONING IS NOT A COMPARABLE PRACTICE

1. In *Crawford*, the Court held that the Confrontation Clause generally bars the admission against a criminal defendant of "testimonial" out-of-court statements unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. The Court overruled *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980), to the extent it held that the admission of testimonial hearsay does not violate the Confrontation Clause as long as it falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." See *Crawford*, 541 U.S. at 60-62 (quoting *Roberts*, 448 U.S. at 66).

The Court based its holding on the historical development of the right to confrontation that preceded the framing of the Confrontation Clause. That history demonstrated that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Crawford*, 541 U.S. at 50. That practice had developed in England under the Marian bail and committal statutes that required justices of the peace to examine witnesses in felony cases and certify the written results to the court where they "came to be used as evidence in some [criminal] cases." *Id.* at 44. One particularly egregious example of the

practice of using *ex parte* examinations as evidence against the accused occurred during the treason trial of Sir Walter Raleigh. At that trial, the statements made by Raleigh's accuser during an *ex parte* examination by the Privy Council were introduced as evidence against Raleigh over his objection that his accuser should be brought before him. *Ibid.* Because *ex parte* examinations like those in Raleigh's case were the target of the Confrontation Clause, the Court explained, "[t]he Sixth Amendment must be interpreted with this focus in mind." *Id.* at 50.

The Court also concluded that "the text of the Confrontation Clause reflects this focus." *Crawford*, 541 U.S. at 51. The Court explained that at the time of the framing of the Confrontation Clause, the term "witnesses" meant "those who 'bear testimony,'" and "[t]estimony" meant "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Ibid.* (citing Noah Webster, *An American Dictionary of the English Language* (1828) (*Webster's*)). To illustrate the focus indicated by the Constitution's text, the Court stated that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." 541 U.S. at 51.

The Court declined to provide a "comprehensive" definition of "testimonial." *Crawford*, 541 U.S. at 68. Instead, it held that "it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a formal trial, and to police interrogations," because "these are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Ibid.* The Court also concluded that the recorded statement at issue in *Crawford*—taken while the declarant was in custody and under investigation for a crime—was the product of police interrogation and

therefore testimonial, because it was "knowingly given in response to structured police questioning." *Id.* at 53 n.4.

2. This case involves statements that are the product of emergency questioning, *i.e.*, the response of law enforcement officers to what they reasonably perceive to be an emergency. Responses to emergency questioning, *i.e.*, questioning that is reasonably necessary to determine whether there is a present or imminent risk of harm to an individual or the public, and if so, how to resolve that emergency, are categorically different from the types of testimonial statements identified in *Crawford*. While *Crawford* did not address whether statements that are the product of such questioning are testimonial, it did provide guidance on how to approach that issue. Because the Court interpreted the Confrontation Clause as principally concerned with outlawing admission of the kind of *ex parte* examinations conducted under the authority of the Marion statutes, and in Raleigh's trial, 541 U.S. at 50, the appropriate inquiry is whether emergency questioning resembles those historical abuses.

As discussed, *infra*, the relevant characteristics of *ex parte* examinations that make them testimonial for purposes of the Confrontation Clause are that: (1) they have a degree of formality in that they impart a clear understanding to the declarant that his statement is being taken for use in a legal proceeding; (2) they can easily be exploited by the government to shape the declarant's statement; and (3) they produce a weak form of live testimony, lacking in independent probative value. See pp. 11-19, *infra*. Because emergency questioning does not possess those characteristics, statements that are the product of emergency questioning are not testimonial for purposes of the Confrontation Clause.

A. While *Ex Parte* Examinations Impart A Clear Understanding That A Statement Is Being Taken For Use In A Legal Proceeding, Emergency Questioning Does Not

1. The justices of the peace who conducted *ex parte* examinations pursuant to the Marian statutes used the statements of the witnesses who appeared before them to make bail and committal decisions. They also sent the recorded depositions to the court for use at trial. Those who were examined by the justices of the peace therefore had a clear understanding that their statements were being taken for use in legal proceedings. They understood that they were being called upon to make "[a] solemn declaration or affirmation * * * for the purpose of establishing or proving some fact." *Crawford*, 541 U.S. at 51 (quoting *Webster's* definition of "testimony"). Persons who appear before grand juries, in pretrial proceedings, or trials share that understanding.

The same is true of persons subjected to police interrogations. Indeed, by definition, a police interrogation as that term is used in *Crawford* should be understood to refer to police questioning that is objectively structured to obtain evidence for use in a legal proceeding and that is taken under circumstances that impart that understanding to the declarant. See *Crawford*, 541 U.S. at 53 n.4. For example, when, as in *Crawford*, a police officer conducts questioning in a custodial setting, precedes the questioning with a warning that the declarant's statement may be used in court, and structures the questioning to produce evidence for trial, the circumstances impart to the declarant a clear understanding that the statement is being taken for use in a legal proceeding.

In contrast, *Crawford* identified several examples of nontestimonial statements, and in each case, the circumstances did not impart to the declarant an understanding that his statement would be used in a legal proceeding. For instance,

Crawford reaffirmed the holding in *Bourjaily* v. *United States*, 483 U.S. 171, 173-174 (1987), that the admission into evidence of a statement made by a defendant's co-conspirator to an undercover informant implicating the defendant in the conspiracy does not violate the Confrontation Clause. *Crawford*, 541 U.S. at 58. The Court explained that a co-conspirator's statement to an undercover informant is not testimonial because it is made "unwittingly" to a government agent. *Ibid.* Thus, even when the government deliberately uses an undercover informant to solicit evidence from a co-conspirator implicating the defendant in the conspiracy, the statement is not testimonial because the co-conspirator is not made aware that the statement is being sought for use at trial.

Similarly, *Crawford* reaffirmed the holding in *Dutton* v. *Evans*, 400 U.S. 74 (1970), that a co-conspirator's statement to a cellmate implicating the defendant in criminal activity may be admitted into evidence without violating the Confrontation Clause. *Crawford*, 541 U.S. at 57. The Court explained that, "by their nature," co-conspirator statements in furtherance of the conspiracy are not testimonial. *Id.* at 56. One of the reasons that is so is that such statements are not made with an understanding that they will be used in a legal proceeding. The same is true of a casual remark to an acquaintance. See *id.* at 51.

2. Statements made in response to emergency questioning fall into the same category. Emergency questioning takes place when the factual circumstances would lead a reasonable official to believe that there may be an emergency—a present or imminent risk of harm to an individual or the public—that requires official action. The ensuing questioning, viewed objectively, is aimed at determining whether there is in fact an emergency, and if so, how to resolve it. A person asked to respond to such questioning is highly likely to understand

that her statements are being sought for that emergency purpose. And given the exigencies in emergency questioning, it is not accompanied by formalities that might lead a declarant to believe that the statement is being taken for use in a legal proceeding.

At the same time, persons in the midst of an emergency are likely to focus primarily on the resolution of the emergency and not on other matters. It is a normal human reaction to prioritize the resolution of an emergency. Attending to something that requires urgent action leaves little room for the mind to focus on other matters. That is certainly true when a person is in the midst of a crisis or is a recent victim of a violent physical assault, as many persons who make 911 calls are. Indeed, the premise of the deeply rooted excited utterance exception to the hearsay rule is that emergencies and other exciting events "still[] the capacity of reflection." Fed. R. Evid. 803(1) and (2) advisory committee's note (1972); see 6 John H. Wigmore, *Evidence* § 1747, at 195 (Chadbourn rev. 1976) (rationale of the excited utterance exception is that an external shock "stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock"). Not every person questioned in a perceived emergency is in such an excited state. But even when an emergency does not overwhelm an individual's reflective powers, the pressure of the emergency is still likely to focus that person's mind on its resolution. In such persons, the pressing need to resolve the emergency is still likely to take precedence, temporarily rendering other concerns of secondary or no importance.[1]

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[1] As the discussion above indicates, statements that are the product of emergency questioning need not qualify as excited utterances under state or federal law. The converse is also true: not all excited utterances are made in the heat of resolving an emergency. For example, while the state-

Petitioner contends (Br. 41) that a reasonable person who "stopped to consider the matter" would understand that her responses to emergency questioning could be used "prosecutorially." Indeed, petitioner contends that, to the extent a more general test than text and history should apply in classifying a statement as "testimonial," the Confrontation Clause should focus on whether a declarant would reasonably have anticipated that his statements *might* be used for law enforcement purposes. Br. 13, 41. But abstracting the emergency away from the situation, and watering down the relevant "anticipation" to what *might* occur, removes what is unique about emergencies and thus destroys the ability to ask whether emergency questioning is akin to the historical practices that animated the adoption of the Confrontation Clause. In the historical examples, the declarants actually understood that their statements were being taken for use in a legal proceeding and that they were making solemn declarations for the purpose of proving some fact. In emergency questioning, as a general matter they do not.

That does not mean that a court should attempt to divine the actual subjective understanding of the person responding to emergency questioning. Because a person's actual subjective understanding is both elusive and unverifiable, such an approach would "entangle the courts in a multitude of difficulties," *White* v. *Illinois*, 502 U.S. 346, 364 (1992) (Thomas, J., concurring in the judgment), and lead to inconsistent results on similar facts. For that reason, an objective approach is appropriate. But since the ultimate inquiry is whether admission of statements that are the product of emergency ques-

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ment made by the child to the police officer in *White* v. *Illinois*, 502 U.S. 346 (1992), and discussed in *Crawford*, 541 U.S. at 58 n.8, was admitted as an excited utterance, it was made in response to police questioning 45 minutes after the assailant left the child's house (see *White*, 502 U.S. at 349-350) (describing and quoting officer's questioning of victim in *White*), and therefore was not the product of emergency questioning.

tioning is the modern equivalent of the historical abuses, any objective inquiry into the likely understanding of a person responding to emergency questioning must be a reasonable proxy for the declarant's actual understanding. Petitioner's proposal to extract the emergency from his objective test, and to imagine instead a person who has stopped to consider all the possible ramifications of his actions, fails to serve as such a proxy. Indeed, extracting the emergency from the inquiry virtually guarantees that the thought process of petitioner's hypothetical reasonable person will fail to match the declarant's.[2]

At the same time, it would not make sense to attempt to determine in every case the understanding of a reasonable person in the declarant's *particular* emergency situation. That approach would also lead to unpredictable and inconsistent results. Instead, because in the general run of cases, a person responding to emergency questioning is likely to be primarily focused on providing information for use in resolving the emergency, and not on providing evidence for use in a legal proceeding, the relevant inquiry should simply be whether a person is responding to emergency questioning. That approach is both sound and administrable. Courts have the means to distinguish between on-the-spot questioning

[2] That is not to question that, in some cases, persons faced with emergency questioning may well recognize on some level that their statements "might" be used for a "law enforcement purpose[]." Pet. Br. 41. But in the historical examples the declarants *clearly* understood that their statements were being taken for use in a legal proceeding, not simply that they might conceivably be used for some law enforcement purpose. It is that more focused understanding that is a characteristic of testimony. Indeed, all hearsay declarants, particularly those discussing criminal activity, might well realize to a greater or lesser degree of awareness that their words may later be used in legal proceedings. Yet any approach that has the potential to sweep all hearsay into the category of "testimonial" statements cannot be correct.

that is reasonably necessary to determine whether a perceived emergency in fact exists, and if so, how to respond, and questioning that is objectively structured solely to produce evidence for use in a legal proceeding. Cf. *New York* v. *Quarles*, 467 U.S. 649, 658-659 (1984).

B. The Government Can Easily Exploit *Ex Parte* Examinations To Shape The Declarant's Statements, But Emergency Questioning Does Not Pose That Same Danger

One salient characteristic of the *ex parte* examinations to which the framers of the Confrontation Clause objected is the ease with which the government could shape the declarant's statements to incriminate the accused. As the Court explained in *Crawford*, "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar." 541 U.S. at 56 n.7.

In holding that police interrogations are akin to the *ex parte* examinations conducted by justices of the peace, the *Crawford* Court relied heavily on that risk of abuse. 541 U.S. at 52-53. The Court emphasized that "[t]he involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are the police or justices of the peace." *Id.* at 53.

Emergency questioning does not pose that same potential for abuse. Public employees who take 911 calls and police officers who help to resolve an emergency on the scene will characteristically focus their energies on that pressing task. See U.S. Amicus Br. at 10-12, *Hammon* v. *Indiana*, cert. granted, No. 05-5705 (Oct. 31, 2005). To officials intent on resolving an emergency, taking the time to shape questioning to produce evidence for trial could only serve as a distraction and impede the resolution of the emergency, possibly risking

harm to the victim or to public safety. There is therefore little risk that emergency questioning will be used to shape testimony for trial. Indeed, it would be an extreme dereliction of duty and contrary to every natural impulse for a government official to forsake the needs of a person imperilled by danger in order build a case for trial. Questioning in an emergency is therefore likely to be exploratory and focused on assessing the needs of the moment, not a means of building a possible future case.

The objective standard for determining whether a government official is engaged in emergency questioning further minimizes any risk of the kind of manipulation that attended traditional *ex parte* examinations. As noted above, to qualify as emergency questioning, the official must confront facts that would lead a reasonable official to believe that there may be an emergency, and the questions must be reasonably necessary to determine whether an emergency exists and, if so, how to resolve it. Questioning that strays from those objectives is not emergency questioning. Any effort to use the happenstance of an emergency to gather evidence for trial that would not be subject to cross-examination is therefore likely to be self-defeating. The very effort to collect such evidence is likely to reveal itself in the questioning, transforming emergency questioning into structured interrogation, and triggering *Crawford*'s restrictions on the admission of testimonial evidence.

C. *Ex Parte* Examinations Produce Weak Forms Of Live Testimony, While Emergency Questioning Often Results In Statements That Have Independent Probative Value

Another characteristic of the *ex parte* examinations conducted by justices of the peace is that they produced evidence that was nothing more than a weak version of live testimony.

The same is true of the modern-day counterparts: testimony before a grand jury, testimony at a preliminary hearing, former trial testimony, and the results of interrogations. The introduction of such testimony raises special Confrontation Clause concerns. The Court has made that point in connection with former testimony, explaining that "former testimony often is only a weaker substitute for live testimony. It seldom has independent evidentiary significance of its own, but is intended to replace live testimony." *United States* v. *Inadi*, 475 U.S. 387, 394 (1986). That same observation applies to the other categories of testimonial evidence *Crawford* identified.

Some out-of-court statements, however, have independent probative value and therefore differ from the historical abuses at which the Confrontation Clause was aimed. For example, statements made in furtherance of a conspiracy "provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court." *Inadi*, 475 U.S. at 395. And "given a declarant's likely change in status by the time the trial occurs, simply calling the declarant in the hope of having him repeat his prior out-of-court statements is a poor substitute for the full evidentiary significance that flows from statements made when the conspiracy is operating in full force." *White* v. *Illinois*, 502 U.S. 346, 354 (1992).

Statements made in response to emergency questioning can also have independent probative value, particularly when they take the form of excited utterances. As the Court explained in *White* v. *Illinois*, 502 U.S. at 356, a "statement that has been offered in a moment of excitement—without the opportunity to reflect on the consequences of one's examination—may justifiably carry more weight with a trier of fact than a similar statement offered in the relative calm of the courtroom." That has been the judgment of courts beginning

more than two centuries ago; that view is reflected in the Federal Rules of Evidence; and that view is widely accepted in the States. *Id.* at 355 n.8. A victim's panic-stricken appeal for help on a 911 tape, for example, can have value that live testimony simply cannot replicate. Thus, the Framers of the Confrontation Clause would readily have perceived a distinction between the admission of the products of emergency questioning and the historical abuses in the use of *ex parte* testimony that they sought to abolish. There is no reason for this Court to extend the testimonial concept in *Crawford* well beyond its historical origins, with the effect of entirely precluding uniquely probative evidence.

II. HISTORY DOES NOT ESTABLISH THAT AN OUT-OF-COURT STATEMENT THAT IMPLICATES A PERSON IN A CRIMINAL ACT IS TESTIMONIAL WHEN THE STATEMENT IS MADE IN RESPONSE TO EMERGENCY QUESTIONING

Petitioner argues that any out-of-court statement to a government agent that implicates a person in criminal activity is testimonial, including statements made in response to emergency questioning. But as discussed, *infra*, petitioner makes no effort to show that statements made in response to emergency questioning bear a kinship to the ex parte examinations at which the Framers directed the Confrontation Clause, and the historical argument he does make is unsupported by the materials upon which he relies.

A. An Accusation Rule Sweeps Far More Broadly Than The Paradigmatic Examples That Prompted the Confrontation Right

Petitioner contends (Br. 15) that any statement made to a government agent that implicates a person in a criminal act is testimonial, including any statement made in response to

emergency questioning. For several reasons, that contention is incorrect.

First, while petitioner asserts (Br. 14-15) that his rule is derived from the approach followed in *Crawford*, in fact, petitioner strays from that approach. *Crawford* held that the Confrontation Clause was aimed at a particular practice that the Framers found objectionable—"the civil law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." 541 U.S. at 50. And *Crawford* further held that the scope of the Confrontation Clause has to be interpreted "with this focus in mind." *Ibid.* Following that approach, the Court held that police interrogations are testimonial because "they bear a striking resemblance to examinations by justices of the peace in England." *Id.* at 52.

Petitioner fails to follow that method of analysis. In particular, he does not attempt to show that emergency questioning is a modern-day counterpart to the civil law mode of criminal procedure that the Framers rejected. Nor is such a showing possible. For the reasons previously discussed, emergency questioning does not have the characteristics of the civil law mode of procedure.

Petitioner's rule would also set aside the well-established practice of state and federal courts of admitting as significant evidence of guilt a statement implicating a person in criminal conduct made in the immediate wake of an attack. See *White*, 502 U.S. at 355 n.8. It is one thing to invalidate state and federal practice when, as in *Crawford*, courts had unpredictably and inconsistently applied a list of factors and had regularly admitted accomplice confessions that were the product of police interrogation, despite the Court's repeated holdings that the Confrontation Clause creates a strong presumption against their admissibility. *Crawford*, 541 U.S. at 63-64. It is another thing, however, to entirely sweep aside a practice

that has not been shown to have been plagued by unpredictability, where the evidence does not share the characteristics of the abuses that animated the Confrontation Clause.

B. History Furnishes No Sound Basis For Treating The Products Of Emergency Questioning As "Testimonial"

Petitioner's case for his proposed rule rests on his assertion (Br. 10-11, 14-34) that the historical evidence shows that the Confrontation Clause was intended to bar the admission of any out-of-court statement to a government agent implicating a person in criminal activity, including a statement in response to emergency questioning. Petitioner has failed to make that historical case.

1. In support of his per se rule, petitioner relies (Br. 16) on the demand of defendants, such as Raleigh, to meet their accusers face-to-face. But Raleigh's accuser was someone who had made a formal accusation against him to the Privy Counsel. As the Court explained in *Crawford*, that is the kind of accuser the Framers had in mind when they established that criminal defendants would have the right to confront the witnesses against them. 541 U.S. at 50 (Confrontation Clause was directed at the abuse in Raleigh's case); see *Webster's*, *supra* (defining "accuse" as "to charge with an offense against the laws, judicially or by a public process"). Petitioner does not cite any historical reference that suggests that the Framers understood an "accuser" to be someone who identified the person responsible for harming him in the immediate aftermath of an attack, in response to emergency questioning.

2. Petitioner also relies (Pet. 19-20) on two English cases that excluded from evidence a constable's testimony about what the victim told him after the crime. But those cases cannot carry the weight petitioner places on them.

First, there is no evidence that those case's rulings on the admissibility of the statements made to the constable affected

the Framers' understanding of the Confrontation Clause. One of the cases—*Rex* v. *Wink*, 6 Car. & P. 398, 172 Eng. Rep. 1293 (1834) —was decided 43 years after Congress approved the Confrontation Clause for submission to the States in 1789, and 41 years after the States ratified it in 1791.

The other case petitioner relies on is *King* v. *Radbourne*, 1 Leach 456, 168 Eng. Rep. 330 (1787). Even if the Framers were familiar with Leache's published account of the significant legal rulings from that case, they would not have learned about the ruling relating to the constable's testimony because that ruling was not included in Leache's account. Rather, that ruling appears in The Proceedings of the Old Bailey, See Pet. Br. 19, a publication that was intended to provide a full account of the testimony in local criminal trials, not to extract from those trials its significant legal rulings. Petitioner provides no evidence that the Framers would have been familiar with the Old Bailey account, much less with the very brief reference in that publication that petitioner cites. It is highly unlikely that the snippet cited by petitioner was "burned into the general consciousness." *Crawford*, 541 U.S. at 46 (citation omitted).

Second, the accounts of the cases do not support petitioner's contention that the admissibility rulings were based on the common law right of confrontation. In *Wink*, the report does not supply an explanation for the ruling. But since the statement was hearsay not subject to any apparent exception, it might well have been excluded on hearsay grounds.[3]

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[3] Wigmore believed that the "appreciation of the impropriety of using hearsay statements" took increasing hold during England during the 17th century, and, by the early 18th century, the general prohibition against hearsay declarations "receive[d] a fairly constant enforcement." 5 John H. Wigmore, *supra*, § 1364, at 18. "Modern scholars have concluded that at the time of the founding the law had yet to fully develop the exclusionary component of the hearsay rule and its attendant exceptions," *Crawford*, 541 U.S. at 69 n.1 (Rehnquist, C.J., concurring in the judgment), but there is

The Confrontation Clause was not intended to preclude the admission of all hearsay, see *Crawford*, 541 U.S. at 51 (historically significant practices that prompted the Confrontation Clause "suggest[] that not all hearsay implicates the Sixth Amendment's core concerns"), but instead was targeted at testimonial hearsay, *ibid.*; see also *id.* at 60-61 (noting proposals to exclude non-testimonial hearsay from Confrontation Clause scrutiny). Thus, a decision on hearsay grounds without more would not have implications for deciding what is testimonial under the Confrontation Clause. For example, a casual remark to a neighbor, offered to prove the truth of the assertion, presumably would have been excludable as hearsay at the time of the framing of the Confrontation Clause. But, as *Crawford* establishes, because that statement is not testimonial, its introduction does not implicate the core concerns of the Confrontation Clause. See *Crawford*, 541 U.S. at 51.

The Old Bailey account of *Radbourne* indicates that the judge instructed the constable not to repeat the victim's statement to him because the defendant was not present at that time. Pet. Br. 21. But that does not mean that the ruling was based on a criminal defendant's common law confrontation right. Radbourne was tried for petty treason, and British law required all evidence in such cases to have been taken in the presence of the accused. See *Radbourne*, 168 Eng. Rep. at 332-333. The ruling may have been based on that statute, rather than a criminal defendant's common law confrontation right.

Finally, while petitioner characterizes the statements excluded in *Wink* and *Radbourne* as fresh reports, neither statement was made during an emergency. The statement in *Wink* was made between five and six hours after the declarant was robbed. 172 Eng. Rep. at 1293. And the state-

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little doubt that hearsay could form a basis for exclusion quite apart from confrontation concerns.

ment in *Radbourne* was made more than one and one-half hours after the crime occurred, following the constable's one-hour meticulous search for evidence. Accordingly, neither *Wink* nor *Radbourne* establishes that statements made in response to emergency questioning are testimonial.

Petitioner also relies (Br. 21-22) on an 1835 decision of the South Carolina Supreme Court. See *State* v. *Hill*, 20 S.C.L. (2 Hill) 607 (Ct. App.). That decision, however, was issued more than 40 years after the framing of the Confrontation Clause; it did not purport to rely on the Confrontation Clause in excluding the evidence at issue; and the evidence at issue was a statement made to a magistrate, not a statement made in response to emergency questioning. That decision therefore has no relevance here.

3. Petitioner next relies (Br. 22-34) on the development of the hearsay rule and its relationship to the doctrine that out-of-court statements were admissible if they formed part of the res gestae. According to petitioner (Br. 24-25), the rule that statements could be admitted as part of the res gestae was limited to statements before the relevant act occurred, such as "Prince Jones, don't shoot me," and did not extend to statements made just after the act, such as "Prince Jones just shot me." In fact, however, that has never been the settled understanding of the res gestae rule. While petitioner has cited nine state court cases decided between 1880 and 1887 that adhere to the res gestae line he identifies, there are other prominent decisions that viewed the res gestae to extend to statements made immediately or very shortly after the event described.

For example, in the only pre-Framing case cited by petitioner—*Thompson* v. *Trevanian*, Skin. 402, 90 Eng. Rep. 179 (K.B. 1694)—the court allowed a witness to testify to what the victim said "immediate[ly] upon the hurt received, and before she had time to devise or contrive any thing for her own ad-

vantage." It also appears that, before the framing of the Confrontation Clause, English courts allowed witnesses to testify about what the victim had told them some time after the crime had been committed.[4]

After the framing of the Confrontation Clause, some criminal courts in England and the United States continued to admit out-of-court statements implicating the defendant in the crime when the statements were made immediately or very shortly after the criminal conduct occurred. For example, in *Rex* v. *Foster*, 6 Car. & P. 325, 172 Eng. Rep. 1261 (1834), a person who witnessed a cab drive by, but did not see the cab run over the victim, was allowed to relate what the victim told him about the incident just after it occurred. Similarly, in *Commonwealth* v. *M'Pike*, 57 Mass. (3 Cush.) 181, 184 (1849), a witness was allowed to testify that he heard the victim cry murder, went to find help, returned to the victim, and was then told by the victim that the defendant had stabbed her. Other cases reached the same result on similar facts.[5]

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[4] *Rex* v. *Salter*, Old Bailey Session Papers Nos. 330-332, at 280 (1755) (statements of victim after an assault identifying the defendant as the assailant) <http://www.oldbaileyonline.org/html_units/1750s/t17550910-29.html>; *Rex* v. *Matthews*, Old Bailey Session Papers No. 164, at 152-153 (1755) (statement of the victim to surgeon after the assault describing an altercation and where it occurred, but not identifying the assailant by name) <http://www.oldbaileyonline.org/html_units/1750s/t17750409_12.html>.

[5] *Commonwealth* v. *Hackett*, 84 Mass. (2 Allen) 136 (1861) (admitting testimony of witness that 20 seconds after he heard the victim cry out that he had been stabbed, the victim told him that the defendant had stabbed him); *People* v. *Vernon*, 35 Cal. 49, 51 (1868) (admitting witness's testimony that 30 to 45 seconds after he heard shots, the victim of the shooting told him that the defendant had shot him) ; *People* v. *Simpson*, 48 Mich. 474, 479 (1882) (admitting witness's testimony that he overheard the victim exclaim immediately after being shot, "My God, Simpson, you have shot me," and that she subsequently responded to the question "Who shot you, Madam?" with, "John Simpson"); *Reg.* v. *Lunny*, 6 Cox C.C. 477 (1854) (admitting witness's statement that victim told him that he was robbed by man who

Petitioner notes (Br. 30) that some scholars have not read *Trevanian* to support the admission of statements made after the relevant conduct has occurred to prove the matter asserted. And he further notes (Br. 26 & n.5) that some writers and courts have criticized *Foster* and *M'Pike*. But this Court examined those three decisions in *Insurance Co.* v. *Mosley*, 75 U.S. (8 Wall.) 397 (1869), and it reached a contrary conclusion with respect to each case. In particular, it relied on *Trevanian* as authority for the proposition that statements made "almost contemporaneously" with an event are admissible as proof of the matter asserted, and it expressly endorsed the decisions in *Foster* and *M'Pike*. See *Mosely*, 75 U.S. (8 Wall.) at 405-409. Petitioner's view that there was a firm understanding that the res gestae rule did not allow statements describing a completed event to be admitted is therefore incorrect.[6]

There is, however, a more basic objection to petitioner's reliance on the development of the res gestae rule. That rule developed as an aspect of the hearsay rule, not as a method for determining limits imposed by the Confrontation Clause. As already discussed, a limitation that has its source in the general rules against the admissibility of hearsay does not have implications for defining the meaning of "testimonial" under the Confrontation Clause. See pp. 22-23, *supra*.

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walked with him to the crossroads); *Aveson* v. *Kinnaird*, 6 East. 189, 193, 102 Eng. Rep. 1258, 1261 (1805) (Chief Justice Lord Ellenborough stating in dicta that, "[i]f [a wife] declared at the time that she fled from immediate terror of personal violence from the husband, I should admit the evidence.").

[6] Cases such as *Trevanian*, *Foster*, *M'Pike*, and *Mosely* are now understood as examples of excited utterances admitted as an exception to the general rule against the admission of hearsay, rather than as applications of the res gestae rule. *E.g.*, *White*, 502 U.S. at 355 n.8 (citing *Trevanian*). Regardless of how they are characterized, however, they show that statements made immediately or very soon after an occurrence have long been admissible in civil and criminal trials.

Indeed, if the res gestae rule reflected an effort to implement the limits established by the Confrontation Clause, and not simply general hearsay standards, one would expect to see evidence that courts applied the rule differently in criminal and civil cases. But petitioner cites no such evidence. And the Court's reliance in *Mosely*—a civil case—on criminal case res gestae precedents suggests the opposite. Nor does he offer any other evidence that would contradict the conclusion of a leading commentator writing in 1880 that there has never been a distinction between the application of the res gestae rule in criminal and civil cases. James B. Thayer, *Bedingfield's Case*, 14 Am. L. Rev. 817, 829 (1880).

4. Petitioner also errs in relying (Br. 27-28) on cases holding that a rape victim's identification of a perpetrator soon after the incident could only be introduced when the victim testified. The only case decided before the framing of the Confrontation Clause cited by petitioner is *King* v. *Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (1779), and that case did not address a situation in which a statement was made during an ongoing emergency. Instead, the report of the case indicates that the rape victim's statement was made immediately after she arrived home. Nor does the report of the case indicate that the decision to exclude the victim's statement was based on grounds that would be relevant to an interpretation of the Confrontation Clause. The stated ground of the decision was that "no testimony whatever can be legally received except upon oath," and that if infants "are found incompetent to take an oath, their testimony cannot be received." 168 Eng. Rep. at 202-203.

The later English and state court cases cited by petitioner likewise do not have a bearing on whether emergency statements are testimonial for Confrontation Clause purposes. While petitioner refers to the cases as involving fresh complaints, he does not identify any case that involved an ongoing

emergency. Indeed, in one of the cases petitioner cites, the statement at issue was made the day after the incident. See *Regina* v. *Guttridges*, 9 Car. & P. 471, 173 Eng. Rep. 916 (1840). In any event, state court and English cases decided long after the framing of the Confrontation Clause have little bearing on the meaning of that Clause.

III. McCOTTRY'S STATEMENT IDENTIFYING PETITIONER AS HER ASSAILANT WAS A RESPONSE TO EMERGENCY QUESTIONING AND THEREFORE NOT TESTIMONIAL

In this case, petitioner's claim of constitutional error relates solely to the admission of McCottry's statement identifying petitioner as her assailant. The Washington Supreme Court ruled that, to the extent any other evidence admitted from the 911 tape was error, that error was harmless, J.A. 128-129, and petitioner has not challenged that harmless error determination in this Court.

Under a correct understanding of the Confrontation Clause, McCottry's statement identifying petitioner as her assailant was permissible. As a review of the transcript of the 911 tape demonstrates, that identification was a response to emergency questioning and therefore was not testimonial.

At the outset of the 911 call, McCottry informed the 911 operator that "[h]e's here jumpin' on me again" and "[h]e's usin' his fists." J.A. 8. McCottry's use of the present tense and the distress in McCottry's voice would have alerted a reasonable 911 operator to the existence of an apparent imminent danger to McCottry's safety. The operator then began asking questions that were reasonably necessary to determine how to resolve that emergency, such as whether the attacker had any weapons and whether he had been drinking. Those questions sought information that was important in assessing the nature of the danger to McCottry and others in

the house, as well as to the police who would be coming to assist her.

The 911 operator's next question—"do you know his last name"— was of the same character. J.A. 9. The identity of a person who may pose a current danger is an important fact to know in determining how to address that possible danger. Officers going to the scene of an apparent emergency "need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim." See *Hiibel* v. *Sixth Judicial Dist. Court*, 542 U.S. 177, 186 (2004). For example, obtaining a suspect's name "may inform an officer that a suspect * * * has a record of violence or mental disorder." *Ibid.* Accordingly, when McCottry named petitioner as the person responsible for hitting her, she was answering a question that was reasonably necessary in determining how to respond to the emergency she had identified. She was not testifying.[7]

[7] Although there is no need to decide whether the 911 operator's additional questions involved emergency questioning, as the Washington Supreme Court concluded, even after McCottry reported that petitioner was running out of the house and was driving away in his car, there was still an apparent emergency. At that point, there remained an imminent danger that petitioner would return immediately and assault McCottry again. Questions that were reasonably necessary to address that possibility constituted emergency questioning.

CONCLUSION

The judgment of the Washington Supreme Court should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

ADRIAN MARTELL DAVIS,

Petitioner,

—v.—

WASHINGTON,

Respondent.

HERSHEL HAMMON,

Petitioner,

—v.—

INDIANA,

Respondent.

ON WRITS OF CERTIORARI TO THE SUPREME COURTS OF WASHINGTON AND INDIANA

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU Women's Rights Project, founded in 1972, seeks to advance equality and justice for women and girls, including vigorous protection for women facing domestic abuse. The ACLU of Washington and the ACLU of Indiana are statewide affiliates of the ACLU.

The ACLU has a long-standing commitment to the fairness of criminal trials, including the right of the criminally accused to confront the witnesses against them. The ACLU accordingly appeared as *amicus curiae* in *Crawford v. Washington*, 541 U.S. 36 (2004), urging the reinvigoration of the Confrontation Clause that *Crawford* embraced. The ACLU also has a long-standing commitment to equal rights for women, which are endangered when the state fails to take appropriate action to punish and deter violence against women. In furtherance of that commitment, the ACLU recently appeared as *amicus curiae* in *Town of Castle Rock v. Gonzales*, ___ U.S. ___, 125 S.Ct. 2796 (2005), in support of a constitutional claim for damages filed by a woman whose three children were killed by her estranged husband after the police failed to enforce a protective order.

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[1] Pursuant to Rule 37.3, letters of consent to the filing of this brief have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici* curiae states that no counsel for a party authored this brief in whole or in part and no person other than *amici* curiae, its members or its counsel made a monetary contribution to the preparation of this brief.

Lower courts have struggled in defining and applying the principles of *Crawford,* especially in domestic violence prosecutions, where pressure to rely on a victim's out-of-court statement is frequently enhanced by the fact that many victims of domestic violence are unable or unwilling to testify at trial. For reasons set forth below, we believe that a proper understanding of the Confrontation Clause requires reversal of the judgments in both *Hammon* and *Davis.* Respect for the Confrontation Clause, however, must not become an excuse for non-enforcement of domestic violence laws. Domestic violence remains a serious social problem that the state has a duty to address through constitutionally appropriate means, some of which are also discussed below.

The proper resolution of these cases is therefore a matter of significant interest to the ACLU and its members.

STATEMENT OF THE CASE

The cases before the Court involve two types of out-of-court statements routinely admitted in evidence-based domestic violence prosecutions – statements by victims to police officers responding to the scene of a domestic disturbance and statements to 911 operators describing a recent or contemporaneous act of violence.

In *Hammon*, police responded to a report of a domestic disturbance. On the scene, they interviewed Amy Hammon, who stated in response to police questioning that she had been assaulted by her husband Herschel. Officers gave her an affidavit to fill out and sign reciting her allegations. The state then charged Herschel Hammon with domestic battery. Amy Hammon did not appear as a witness at his bench trial, although she had been subpoenaed by the prosecution. In her absence, and over defendant's objection, one of the responding officers testified to Amy Hammon's

oral statements and her affidavit was admitted into evidence. This was the only evidence offered to prove the crime of domestic battery.

Herschel Hammon was tried before this Court decided *Crawford* and the trial court admitted the statements at issue under two hearsay exceptions. Following *Crawford,* the Supreme Court of Indiana ruled that Amy's oral statement was not testimonial within the meaning of *Crawford* and was thus properly admitted. It reached the opposite conclusion with regard to the written statement, but nevertheless concluded that its admission was harmless error because the case was tried before a judge rather than a jury. *Hammon v. State,* 829 N.E.2d 444, 457-59 (Ind. Sup.Ct. 2005). The court construed *Crawford* as requiring a subjective inquiry into whether either the questioner or the declarant was "principally motivated by a desire to preserve the statement" for potential use in future legal proceedings. *Id.* at 456.

In *Davis*, a caller dialed a 911 operator and hung up. The operator called back and spoke to Michelle McCottry, who stated in response to the operator's questions that she had been assaulted by her former boyfriend, Adrian Davis. McCottry did not testify at the subsequent trial for felony violation of a domestic no-contact order. Instead, the prosecution used portions of the recording of her conversation with the 911 operator as the only evidence identifying Davis as the assailant.

The Supreme Court of Washington first observed that *Crawford* requires an examination of "the circumstances of the 911 call in each case to determine whether the declarant knowingly provided the functional equivalent of testimony to a government agent." *State v. Davis,* 111 P.3d 844, 850 (Wash.Sup.Ct. 2005). It then held that "the portion of McCottry's 911 call that identified Davis as her assailant was

non-testimonial and properly admitted" because they were made as part of an ongoing emergency situation and there was no evidence that she intended her statements to be used for prosecution purposes. *Id.* at 851.

SUMMARY OF ARGUMENT

The present cases involve the relationship between two vital concerns. First, criminal trials must be conducted fairly and in accordance with the Sixth Amendment's Confrontation Clause. Second, violence against women, and domestic violence in particular, is a significant social problem that has too often failed to receive the attention it deserves from the criminal justice system. These concerns cannot and should not be treated as mutually incompatible. Victims of domestic violence have a right to expect that laws designed for their protection will be enforced against their abusers, and those accused of domestic violence have a right to cross-examine the witnesses against them in any criminal proceeding.

If the victim is willing to testify, the solution is simple. In many cases, however, domestic violence victims are unwilling to testify for various reasons, including the fear of further victimization. Many prosecutors in the past used that reluctance as an excuse to abandon prosecutions they were not enthusiastic about in the first instance. That, in turn, produced a public backlash that forced the law enforcement community to treat domestic violence more seriously. In response, prosecutors have increasingly sought to overcome the problem of reluctant domestic violence witnesses by employing what is sometimes called an "evidence-based prosecution" or "victimless prosecution," where the victim's out-of-court description of the crime is entered into evidence in lieu of live testimony from the

witness. Unfortunately, that has merely replaced one problem with another.

As this Court explained in *Crawford*, the Confrontation Clause prohibits the use of testimonial evidence that has not been subject to cross-examination even if there are indicia of reliability that would otherwise satisfy the rules of evidence governing hearsay. 541 U.S. at 62. That is because the Confrontation Clause serves a broader purpose than the hearsay rules. Among other things, the framers of the Constitution were well aware that the reliance on *ex parte* evidence undermines the credibility of the judicial process regardless of how reliable the evidence might be in particular cases. *See, e.g., Pointer v. Texas*, 380 U.S. 400, 404 (1965). By its very nature, such *ex parte* evidence is also more susceptible to manipulation. *See, e.g., Crawford*, 541 U.S. at 56 n.7.

In *Crawford* itself, there was little dispute that the challenged statement was in fact testimonial and thus no need for the Court to define the limits of that term with any precision. These cases arise in a context that has proven more vexing for the lower courts. In our view, the purposes of the Confrontation Clause are best served by an objective test that does not turn on the speaker's motivation but, rather, asks whether a reasonable person under the circumstances would have understood that any accusatory statements could be used for criminal investigation or prosecution. That is the test we proposed in *Crawford*, and we continue to believe it is correct. *See* 541 U.S. at 52.

Because neither court below applied this standard, neither judgment can be sustained. A strategy to address domestic violence cannot be premised on an end run around the Constitution. At the same time, compliance with the Constitution does not and cannot relieve government officials of their obligation to develop an effective response to

domestic violence. For example, experience has shown that domestic violence victims are more likely to testify if they have access to advocates who explain the process, help victims ensure their safety, and work with victims to deal with the legal, economic, and medical issues stemming from the violence. This is not surprising, but it is often overlooked.

ARGUMENT

I. OUT-OF-COURT STATEMENTS ARE "TESTIMONIAL" UNDER THE CONFRONTATION CLAUSE, AND THUS INADMISSIBLE, IF A REASONABLE PERSON UNDER THE CIRCUMSTANCES WOULD UNDERSTAND THAT THE STATEMENTS COULD BE USED FOR CRIMINAL INVESTIGATION OR PROSECUTION

The compact language of the Confrontation Clause -- "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him" -- serves many purposes. *See* Akhil Reed Amar, *Twenty-Fifth Annual Review of Criminal Procedure – Preface: Sixth Amendment First Principles*, 84 Geo. L.J. 641, 643, 689 (1996). A primary goal is to ensure that evidence against the accused is reliable. But an exclusive focus on confrontation as a mere proxy for quality of evidence led to the unpredictable and ultimately unworkable framework of *Ohio v. Roberts*, 448 U.S. 56 (1980), which linked Confrontation Clause analysis with hearsay rules of evidence in a manner that *Crawford* ultimately rejected. As confrontation law develops under *Crawford*, courts should not ignore these other values.

- The requirement of confrontation at trial affects law enforcement before trial, by removing an incentive for police to fabricate inculpatory out-of-court statements or to procure them through coercion or duress. The declarant's appearance for cross-examination "permits the uncovering and revealing of intentional or negligent governmental abuses in the creation of testimony, abuse that leaves the individual at the mercy of a vastly more powerful state and that may expose the innocent to conviction at the hands of vindictive or incompetent police or prosecutors." Andrew E. Taslitz, *What Remains of Reliability: Hearsay and Freestanding Due Process After Crawford v. Washington*, 20-Sum. Crim. Just. 39, 41 (2005).

- At trial, confrontation is also a matter of simple fairness for the accused, giving defendants the best opportunity to mount their challenge to the state's best evidence. It has also been recognized since Biblical times that some form of structured face-to-face meeting between the accuser and the accused is at the core of justice. Confrontation thus has a moral component above and beyond its utility as a truth-finding mechanism. This is why the Sixth Amendment makes confrontation a "right" of the accused, and not merely a direction to the courts.

- Confrontation also has benefits after trial. By ensuring that the state brings its best evidence to trial, and by giving the defendant a fighting chance to contest it, public confidence in the trial's result is enhanced, no matter what the outcome. As with the right to trial by jury, "there are good political and symbolic reasons" to insist on confrontation during criminal trials; it too "promotes the perceived fairness

and legitimacy of the justice system." Taslitz, *What Remains of Reliability,* 20-Sum. Crim. Just.at 42,

Taking these and other values together, confrontation becomes more than just an evidentiary tool – it is a fundamental characteristic of the "way we do judicial business." Richard D. Friedman, *Confrontation: The Search for Basic Principles,* 86 Geo. L.J. 1011, 1028-29 (1998). The ACLU submits here, as it did in *Crawford*, that statements are testimonial -- and hence not admissible for the truth of the matter asserted in the absence of confrontation -- when they are made under circumstances in which a reasonable person would understand that the statements could be used for criminal investigation or prosecution.

The standard proposed by the ACLU is consistent with the text of the Confrontation Clause, which requires the production at trial of a "witness against" the accused. Whatever else might be encompassed in the term, it is certainly reasonable to conclude that one is acting as a "witness against" a person when one knowingly tells the police that the person has engaged in criminal activity, both because of the accusatory nature of the statement and because of the foreseeable likelihood that the statement will be used as the basis for further law enforcement activity. To be sure, many statements are made to police by persons who are not knowingly acting as witnesses against another, as when a conspirator makes a statement to an undercover officer in the conspiracy. *See Bourjaily v. United States,* 483 U.S. 171, 183-84 (1989). But the words "witness against" cannot be satisfactorily defined in any way that would exclude situations where a person knowingly delivers to the police an accusation that another person has committed a crime.

Focusing on a statement's content, rather than its form, is entirely consistent with *Crawford.* There, the Court

categorically rejected the notion that the Confrontation Clause only applies to in-court testimony. 541 U.S. at 50-51. It rejected the notion that a person is only acting as a "witness against" the accused when he gives a statement under oath. *Id.* at 52. It rejected the notion that a testimonial statement must be in writing. (Indeed, the excluded statements by Sylvia Crawford at the police station were oral.) And finally, *Crawford* was carefully written to allow for a more expansive definition of testimonial statements to develop in later cases. *Id.* at 68 (the Confrontation Clause "applies at a minimum to prior testimony [in a courtroom] and to police interrogations," but other statements may be testimonial as well).

The proposed test also furthers the interest in predictability articulated in *Crawford* because it is an objective inquiry. As such, it avoids the dangers inherent in allowing courts to resolve admissibility questions based on the type of subjective inquiries often permitted or required under hearsay law that the Court rejected as constitutionally infirm in *Crawford*. Under an objective inquiry, courts should not rely on a particular declarant's subjective reason for making a statement in determining whether it is testimonial. Thus, an objective inquiry will avoid the phenomenon, on full display in the present cases, of judges speculating about the state of mind of an absent person to determine his or her unspoken motivation for making an accusatory statement to the police. Such determinations, naturally, are unassailable precisely because the defendant cannot question the witness about the circumstances surrounding the statement. A test that requires a judge to divine an absent witness' subjective motivations will necessarily generate inconsistent results, as it did under the *Roberts* framework.

These and similar reasons have convinced many federal courts of appeals that the best measure of a testimonial statement under *Crawford* is whether a reasonable person in the declarant's circumstances would expect the statement to be the basis for further investigation or prosecution by law enforcement. *E.g., U.S. v. Hinton*, 423 F.3d 355, 359 (3rd Cir. 2005) (confrontation right applies to "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."); *U.S. v. Cromer*, 389 F.3d 662, 674 (6th Cir. 2004) ("Statements 'made to the authorities who will use them in investigating and prosecuting a crime, ... made with the full understanding that they will be so used,' are precisely the sort of accusatory statements the Confrontation Clause was designed to address") (citation omitted); *U.S. v. Saget*, 377 F.3d 223, 229 (2nd Cir.2004) ("the [Crawford] Court would use the reasonable expectation of the declarant as the anchor of a more concrete definition of testimony.").

II. *HAMMON*: THE SIGNIFICANCE OF INTERROGATION

The fundamental mistake of the Indiana Supreme Court in *Hammon* was to assume that the examples of testimonial statements provided by *Crawford* (in-court testimony and police interrogations) constituted an exhaustive list that relieved it of any further obligation to assess whether the admission of Amy Hammon's statement was consistent with the underlying purposes of the Confrontation Clause. Based on that misunderstanding, the Indiana Supreme Court then focused its attention on whether the oral conversation between Amy Hammon and the police was an interrogation. The court concluded that it was not an interrogation because the officers' questions were not

"attempts by police to pin down and preserve statements" but instead were "efforts directed to determining whether an offense has occurred, protection of victims or others, or apprehension of a suspect." 829 N.E. 2d at 457. The court also considered it significant that Amy Hammon's "motivation was to convey basic facts," and that there was no "suggestion" that Amy intended her oral statements to be preserved or otherwise used against her husband. *Id.* at 458.

As an initial matter, the Indiana court relied on an inappropriately cramped notion of what constitutes an interrogation. *Crawford* made clear that its use of the term interrogation was not limited to the facts of that case (extended in-custody questioning of a potential suspect). Instead, the term is to be used in its "colloquial, rather than any technical legal, sense" for Confrontation Clause purposes. 541 U.S. at 53 n. 4. . *See also U.S. v. Baker*, 2005 WL 3369204 at *3 (11th Cir. 2005) (citations omitted) ("As the *Crawford* Court used the term 'interrogation' in the 'colloquial' and not 'technical legal' sense, statements given in a formal interrogation setting at a police station and witness statements given to an investigating police officer are both considered "testimonial'.").

The facts of *Hammon* clearly fit within the colloquial understanding of an interrogation. Upon arriving at her home, the police questioned Ms. Hammon about suspected criminal activity. 829 N.E.2d at 446-47. When she initially responded that nothing was the matter, the police investigated the scene and then returned and renewed their questioning as to what had occurred. *Id.* Upon this renewed questioning, she stated that her husband had assaulted her. At a minimum, repeated police questioning of a witness about a suspected crime constitutes interrogation under any reasonable definition of that term.

Moreover, if the difference between interrogation and other types of questioning hinges on particular indicia of formality, the Confrontation Clause inquiry can be easily manipulated by police, prosecutors, and the courts:

> If certain characteristics are deemed crucial for treating a statement as testimonial, then repeat players involved in the creation or receipt of prosecution evidence will have a strong incentive, and often ready means, to escape that treatment, simply by avoiding those characteristics. We have seen this already. Some courts have indicated that even if a statement made knowingly to the police accuses a person of a crime, it is not testimonial unless it is the product of a formal interrogation conducted after the police have determined that a crime has been committed. Some courts have held that, so long as the police can be deemed to have been assessing and securing the scene, even a statement making an express criminal accusation is not testimonial. As a result, we have seen police advised to try to secure accusatory statements before beginning what would necessarily be deemed a formal interrogation.

Richard D. Friedman, *Grappling with the Meaning of "Testimonial,"* 71 Brooklyn L.Rev. 241, 248-49 (2005); *see also* Robert P. Mosteller, *"Testimonial" and the Formalistic Definition – The Case for an "Accusatorial" Fix*, 20-Sum. Crim. Just. 14, 20 (2005) ("If the form of the statement is important to its testimonial nature ... then governmental officials who receive the statement can consciously manipulate those circumstances to exclude the statement from coverage."). As the Sixth Circuit recently observed: "If the judicial system only requires cross-examination when someone has formally served as a witness against a

defendant, then witnesses and those who deal with them will have every incentive to ensure that testimony is given informally." *U.S. v. Cromer*, 389 F.3d at 675.

More fundamentally, however, the Indiana court's focus on the term "interrogation" itself is misplaced. The better approach is not to debate the definition of "interrogation" (a word not found in the Confrontation Clause), but to focus on whether Amy Hammon was a "witness against" Herschel Hammon when she told police he had assaulted her. She plainly was, because a reasonable person in her situation would know that telling the police that Herschel assaulted her would almost certainly lead to further investigation and might well result in Herschel's arrest. Introduction of the statement at trial carries the same potential for law enforcement manipulation and untested accusation as the ex parte affidavits used against Sir Walter Raleigh. From the defendant's point of view, Amy Hammon's oral statement as recounted by the police is equally damning as the affidavit recounting the same facts that the Indiana court found itself bound to exclude. 829 N.E.2d at 458. Both are equally impossible to test before thefinder of fact.

By resolving *Hammon* with reference to the broader question, the Court can avoid the exercise of choosing among competing definitions of "interrogation." It would also avoid limiting the analysis to cases in which the statements to the police are in response to questioning. It is inevitable that there will be statements made to police officers at a crime scene that are volunteered or unsolicited. Answering only the narrow question of whether statements in response to police questioning constitute an "interrogation" will leave courts and litigants with no guidance as to other types of statements made to police investigating a crime, even where those statements are clearly accusatory. And, undoubtedly, it

will spawn a whole new round of litigation around the issue of when a particular statement is truly "in response" to an interrogation, as opposed to volunteered or unsolicited.

The role of the police in procuring the challenged statement is often relevant, but not dispositive to the Confrontation Clause analysis. For example, if Amy Hammon had written her statement on her own and delivered it to the police, the Confrontation Clause would still have barred its admission in court. On the other hand, *Crawford* understandably expressed a particular concern with government involvement in producing or eliciting an out-of-court statement, a concern the ACLU shares. *Id.* at 52 ("Police interrogations bear a striking resemblance to examinations by justices of the peace in England."); *Id.* at 53 ("The involvement of government officers in the production of testimonial evidence presents the same risk [as justices of the peace conducting examinations under the Marian statutes.") Police questioning is highly relevant to whether a declarant would reasonably understand that his or her statements would be available for later use in a criminal prosecution or investigation. Speakers reasonably understand that police are gathering evidence for prosecution when they question a person about a crime. Properly understood, therefore, the existence of police questioning is usually sufficient to establish that a statement is testimonial, but it is not necessary.

The objective standard focusing on a reasonable person's understanding offers multiple advantages over the test relied on by the *Hammon* court: it is simple, consistent with the constitutional language, resistant to word games, and does not hinge on speculative assumptions about subjective motivations of witnesses (the most important of whom was absent).

III. *DAVIS:* THE SPEAKER'S MOTIVATION AND DEMEANOR

Where the primary error in *Hammon* was its misplaced focus on whether the police questioning of Amy Hammon constituted "interrogation," the primary error in *Davis* was its misplaced focus on the subjective motivation and demeanor of the witness, Michelle McCottry. The Washington Supreme Court reasoned that statements within a 911 call should be classified according to whether they are a "cry for help to be rescued from peril" (nontestimonial) or whether they are "generated by a desire to bear witness" (testimonial), irrespective of whether the content of the cry for help also implicates the defendant in a crime. *See, e.g. State v. Davis*, 111 P.3d at 849. The court then characterized Ms. McCottry's statement as the former rather than the latter, in part because of "her crying and hysterical" demeanor. *Id.* at 850.

This approach undermines the purposes of the Confrontation Clause. From the perspective of the defendant whose confrontation right is at stake, it does not matter whether the witness against him is motivated by the specific subjective desire to have the statement be used in a later trial. *White v. Illinois*, 502 U.S. 346 (1992), properly rejected the suggestion that the Confrontation Clause would hinge on whether "the statement has been made for the *principal purpose* of accusing or incriminating the defendant." *Id.* at 352 (emphasis added).[2] So long as the declarant is narrating a description of the defendant's allegedly criminal behavior to the police or other law enforcement personnel (including 911 operators), the declarant is a "witness against" the

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[2] This aspect of *White's* holding was not called into question by *Crawford*.

accused. The testimonial nature of the statement should be tested by reference to how a reasonable person would expect the statement to be used.[3]

Of course, 911 service plays a dual role in our society – it can be both a mechanism to summon help in an emergency and a mechanism for reporting criminal activity. Furthermore, a single 911 call often invokes both roles. Under the objective standard proposed, however, statements made by during a 911 call describing criminal activity should be treated as "testimonial" for Confrontation Clause purposes in light of the common knowledge that 911 operators are affiliated with law enforcement, and that their job is to transmit information about criminal activity from the caller to the police.[4]

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[3] Other courts have gone farther than Washington to say that any statement that is an excited utterance is per se nontestimonial. *See, e.g., U.S. v. Brun*, 416 F.3d 703, 707-08 (8th Cir. 2005) (indicating that statement to 911 operator is nontestimonial when it is "emotional and spontaneous" and holding that statements to responding police officer were "excited utterances and thus nontestimonial statements"); *People v. Moscat*, 3 Misc. 3d 739, 746 (N.Y. Sup. Ct. 2004) (adopting a rule that 911 calls are not testimonial for the same reason that they are excited utterances—"because there has been no opportunity for the caller to reflect and falsify her (or his) account of events"); *People v. Corella*, 18 Cal. Rptr.3d 770, 776 (Cal. Ct. App. 2004) (stating that it is difficult to perceive any circumstances under which an excited utterance would be testimonial); *State v. Banks*, No. 03AP-1286, 2004 WL 2809070, at *3 (Ohio Ct. App. Dec. 7, 2004) (stating that *Crawford* does not apply to statement subject to common-law exceptions to the hearsay rule, such as excited utterance)

[4] In *Davis*, the state court brushed aside the argument that Ms. McCottry reasonably knew that her statements could be used to prosecute Mr. Davis because it is common knowledge that statements made in the course of a 911 call can be used prosecutorially with the observation that there was "no evidence that McCottry had such knowledge or that it influenced her decision to call 911." *Davis*, 111 P.3d at 850. It confidently concluded that, under the facts of the case, McCottry called 911 "because of an

In a given case, there may be some portions of 911 calls (or indeed portions of any out-of-court statement) that are not testimonial and can be introduced into evidence. This would include the portion of the call that is strictly a "cry for help" and does not describe another person's criminal activity. *See People v. West*, 823 N.E.2d 82, 91 (Ill. App. Ct. 2005) (finding statements to 911 operator describing nature of alleged attack, victim's medical needs, and victim's location to be nontestimonial, while statements describing assailants' vehicle and the direction in which they fled to be testimonial). Although this part of a call may be a small portion of the entire conversation, the fact that a person sought aid from 911 at a particular time will often be an important and relevant item of evidence for the prosecution.

The state court decisions in both *Davis* and *Hammon* illustrate the same tendency seen in many *Roberts*-era cases. When *Roberts* said out-of-court statements could be admitted into evidence without confrontation if they fell within a "firmly rooted" hearsay exception, courts were pressured to steadily expand these exceptions. *Davis* and *Hammon* illustrate the similar pressure on courts to expand the definition of "nontestimonial." To avoid this risk, courts should not pretend that a person is not a "witness against" another when making statements in circumstances where a

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immediate danger" and that there was "no evidence [she] sought to 'bear witness' in contemplation of legal proceedings." *Id.* at 851. The court did not explain how the defendant could have produced this evidence so long as Ms. McCottry was unavailable and could not be questioned regarding her motives and her understanding of how her statement might be used. This is similar to the *Hammon* court's finding with respect to Amy Hammon's oral statement that her "motivation was to convey basic facts and [there] was no suggestion that [she] wanted her initial response to be preserved or otherwise used against her husband at trial," even though she was unavailable and could not be questioned as to her motives. 829 N.E.2d at 458.

reasonable person would expect those statements to be used for criminal investigation or prosecution.

There may be room in Confrontation Clause jurisprudence for genuine exceptions to the confrontation rule. *See generally Mattox v. United States*, 156 U.S. 237, 243 (1895) (noting that in some instances exceptions to the Confrontation Clause may be appropriate when such exceptions were recognized at the time of its adoption). Indeed, *Crawford* notes that there may be an exception to the confrontation requirement for dying declarations. 541 U.S. at 56 n.6. It also reaffirms that the Confrontation Clause does not bar admission of statements made by witnesses whose unavailability arises from the defendant's own wrongdoing. *Id.* at 62. If this Court chooses to make an exception for accusatory statements made during exigent circumstance or as part of a cry for help, rather than asserting that such statements are nontestimonial, the more analytically justified approach would be to recognize such an exception explicitly and justify it in terms of the history and purposes of the Confrontation Clause. *See id.* at 58 n.8.

Absent such an exception, the reasoning and results in *Davis*, like those in *Hammon*, cannot be sustained.

IV. THE CONFRONTATION CLAUSE IS NOT INCOMPATIBLE WITH EFFECTIVE DOMESTIC VIOLENCE PROSECUTIONS

Just as the difficulties of prosecuting domestic violence cannot be an excuse for abandoning the Confrontation Clause, the requirements of the Confrontation Clause cannot and should not be seen as an insurmountable barrier to domestic violence prosecutions.

A. The Problem of Reluctant Witnesses

Prosecutors committed to trying domestic violence cases have tended to rely so heavily on victims' out-of-court statements because many forces discourage victims from testifying. According to some recent estimates, 80 to 90 percent of domestic violence victims whose abusers become involved with the criminal justice system recant or otherwise fail to assist the prosecution at some point in the proceedings. *See* Tom Lininger, *Prosecuting Batterers After Crawford*, 91 Va. L. Rev. 747, 768 n.103 (2005), Douglas E. Beloof & Joel Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, 11 Colum. J. Gender & L. 1, 3 (2002).

Some victims do not cooperate with prosecutors because they fear retaliation by the defendant. That fear may be a reasonable projection from past conduct. In other instances there may be express threats of retaliation or actual retaliatory violence by the batterer. Indeed, data indicate that such threats and retaliation may occur in the majority of domestic violence prosecutions. *E.g.*, Lininger, *supra*, at 769; Laura Dugan *et al.*, *Exposure Reduction or Retaliation? The Effects of Domestic Violence Resources on Intimate Partner Homicide*, 37 Law & Soc'y Rev. 169, 179 (2003); Barbara Hart, *Battered Women and the Criminal Justice System*, 36 Am. Behavioral Scientist 624, 626 (1993); *see also* Deborah Epstein *et al.*, *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 Am. U.J. Gender Soc. Pol'y & L. 465, 476 & n.38 (2003) (describing study in which women identified fear of batterer as the number one reason why they were unwilling to cooperate with government). Battered women are at a heightened risk of violence at the moment they seek to separate from their

abusers; cooperation in criminal prosecution is often meant and understood as a means of formally separating from an abuser and thus presents increased danger to victims. *E.g.*, Dugan *et al.*, *supra*, at 174; Ronet Bachman & Linda E. Saltzman, U.S. Department of Justice, *Violence Against Women: Estimates from the Redesigned National Crime Victimization Survey* (1995); *see generally* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1 (1991) (explaining dynamics and prevalence of separation assault). As a result, many individuals who have experienced domestic violence quite reasonably conclude that criminal prosecution of their batterers will leave them less safe.

Others victims of domestic violence do not testify for other reasons, including: economic dependence on their batterer; concern that an immigrant batterer will be deported upon conviction; fear of an adverse reaction from family or community, who might regard a victim's participation in the prosecution as a betrayal; apprehension that involvement in the criminal justice system will lead to the loss of child custody to child protective services; or continuing emotional connections to their batterer. Epstein *et al.*, *supra*, at 477-82; Hart, *supra*, at 627-28. Victims of domestic violence, like other victims of crime, sometimes cease to cooperate in prosecution because of the time and effort that such cooperation entails. The difficulties presented by taking repeated time off work or repeatedly finding child care in order to participate in court proceedings, for instance, can impose significant barriers to participation, particularly to individuals who may be facing other crises in their lives as a result of the violence they have experienced. Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 Yale J. L. & Feminism 3, 25 (1999); Hart, *supra*, at 628. Moreover, while attitudes are changing, battered

women too often are viewed by the criminal justice system as somehow responsible for the crimes against them, leading domestic violence victims to reject participation in criminal trials. *E.g.*, Hart, *supra*, at 626-27.

It is also important to recognize, however, that as with all crimes, some alleged victims refuse to testify because their initial accusations were untrue or exaggerated. For instance, batterers may falsely accuse their partners of abuse in an attempt to gain an upper hand in the relationship. *E.g.*, Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 Wis. L. Rev. 1657, 1692-93 (2004). Thus, the function of confrontation as a tool to vindicate the innocent has as much of a role in domestic violence prosecutions as in other criminal prosecutions.[5] Additionally, a fair trial with confrontation rights may itself heighten the deterrent effect of the criminal conviction by demonstrating the system's fairness to the accused. Individuals arrested for domestic violence may be less likely to engage in violence in the future when they believe that they were treated in a procedurally fair manner upon their arrest. See Raymond Paternoster et al., *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 Law and Soc'y Rev. 163, 165 (1997).

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[5] While a substantial majority of domestic violence prosecutions involve a man accused of harming a woman, it would be a mistake to think that only male defendants benefit from the right to confrontation. There are increasing numbers of prosecutions of women for domestic assaults on men, and jurisdictions with large gay populations have begun to bring domestic violence charges against men and women in same-sex relationships.

B. States Have A Variety of Available Tools To Facilitate Domestic Violence Prosecutions Without Sacrificing Confrontation Clause Values.

States have many tools available to address the reasons that domestic violence victims fail to testify and thus pursue domestic violence prosecutions consistent with the Confrontation Clause. Some data suggest that by using combinations of these techniques, victims will cooperate fully in a prosecution in sixty-five to ninety-five percent of cases. Angela Corsilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 Fordham L. Rev. 853, 873 (1994).

First, victims who receive the services of a victim advocate are far more likely to assist with the prosecution of their abuser. Melanie Randall, *Domestic Violence and the Construction of 'Ideal Victims': Assaulted Women's "Image Problems" in Law*, St. Louis Univ. Pub. L. Rev. 107, 143 (2004) (battered women three times more likely to be willing to testify when they met with an advocate); *see also* Epstein, *supra*, at 20 (1999) (survivors able to access interpersonal support twice as likely to cooperate with prosecution). Advocates can work with victims to demystify the criminal process, address the range of needs created by the violence, help link victims to services, assist them with civil legal needs, and provide encouragement and support. *See, e.g.*, Sack, *supra*, at 1728-29 (2004). For instance, advocates canhelp address a victim's concerns that cooperation will endanger her by offering safety planning or assistance in obtaining a protective order. They might also assist a victim who is concerned about loss of a batterer's income by directing her to available benefits and explaining the application procedures for these benefits. Jurisdictions can

enhance domestic violence prosecution by providing these domestic violence advocacy services.

Second, jurisdictions can do more to make safety a reality for domestic violence victims. Increased resources to services for individuals seeking to escape domestic violence, including housing, job training, and the like, may also indirectly lead to greater victim cooperation in criminal prosecution by reducing the danger and cost of ending a violent relationship. *See generally supra* at 1735 (2004).

Third, some of the obstacles to testifying are the result of inefficiency within the criminal justice system. By coordinating the often separate fields of criminal prosecution and civil no-contact orders, prosecutors or criminal court judges can help victims maneuver within the legal system and reduce the frustration that leads to noncooperation. Epstein, *supra*, at 21-34; Sack, *supra*, at 1731-32. Women who have experienced domestic violence are also more likely to cooperate with prosecution when they are not implicitly or explicitly blamed for the violence against them by police, prosecutors, or judges. *See* Hart, *supra*, at 626.

Fourth, because victims' willingness to participate in criminal proceedings often diminishes over time, preserving testimony at an earlier stage may permit prosecutions to go forward that otherwise would have floundered on the lack of victim testimony. Lininger, *supra*, at 784-97.

Fifth, thorough police work may help ensure a successful prosecution even if the complaining witness does not testify. Under the *Roberts* rule, police had confidence that they could obtain a conviction with little more than a 911 tape, thus eliminating an incentive to pursue other leads that could help seal the case. To be sure, a large number of domestic assaults are witnessed only by the assailant and the victim. But in other cases there may often be other

witnesses, such the person(s)who first called the police in *Hammon*, or the other persons on the scene (children and the man named Mike) when the 911 call was made in *Davis*. It would be a mistake for the Court to believe that domestic violence can be prosecuted only through a relaxed approach to the Confrontation Clause.

C. The Fight Against Domestic Violence Should Not Be Measured Solely In Terms of Convictions

Some advocates have expressed concerns that application of *Crawford*'s rule to the kinds of statements at issue in these cases will lead police to ignore domestic violence calls, because they consider it pointless to intervene if the alleged perpetrator will not be convicted as a result of an arrest. Others suggest that the inadmissibility of these statements give batterers an even greater incentive to prevent victims from testifying. *Amici* fully agree that these are outcomes to avoid and believe jurisdictions should take steps such as those set out above to avoid this result. Moreover, whether a successful prosecution ultimately follows or not, police must continue to provide prompt emergency assistance in domestic violence cases to protect the health and safety of women and their families.

In addition, while domestic violence is a crime deserving vigorous enforcement and punishment, the number of defendants convicted is not the only, or even the most important, measure of success in the struggle against domestic violence. Helping domestic violence victims address their immediate needs for housing, financial support, physical safety, and the like indirectly increases the probability victims will cooperate with prosecution; far more importantly, however, such assistance directly increases the likelihood victims of violence will be able to end violent relationships and protect themselves in the long term. Safety

and autonomy for victims of violence is the ultimate goal of domestic violence policy. While criminal law enforcement is an important piece of such efforts, standing alone it cannot achieve these goals. Communities will be most successful in eradicating domestic violence when they mount a broad response to the problem.

CONCLUSION

For the reasons stated above, the judgments in *Davis* (05-5224) and *Hammon* (05-5705) should be reversed.

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Nos. 05-5224 and 05-5705

In the

Supreme Court of the United States

ADRIAN MARTELL DAVIS,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

HERSHEL HAMMON,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

On Writs of Certiorari to the Supreme Court of Washington and the Indiana Supreme Court

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BRIEF OF AMICUS CURIAE COOK COUNTY, ILLINOIS IN SUPPORT OF THE RESPONDENTS

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QUESTIONS PRESENTED

Whether an alleged victim's statements to a 911 operator naming her assailant—admitted as "excited utterances" under a jurisdiction's hearsay law—constitute "testimonial" statements subject to the Confrontation Clause restrictions enunciated in *Crawford v. Washington*, 541 U.S. 36 (2004).

Whether an oral accusation made to an investigating officer at the scene of an alleged crime is a testimonial statement within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004).

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INTEREST OF AMICUS

Amicus is the County of Cook, Illinois, within which the Criminal Division of the Cook County Circuit Court constitutes one of the most active criminal court systems in the country. The Cook County State's Attorney is the chief legal officer of Cook County and is constitutionally and statutorily charged with the duty to prosecute all criminal actions in the circuit court for his county. The outcome of the litigation in the two cases before this Court will have a direct impact on the prosecutions in Cook County and will significantly affect the execution of the Cook County State's Attorney's duties. As the legal representative of a unit of state government, Supreme Court Rule 37 allows *Amicus* to file a supporting brief without permission of the parties. Therefore, Cook County, Illinois respectfully submits this brief as *Amicus Curiae* in support of Respondents.

STATEMENT OF THE CASE

Amicus adopts the Statements of the Cases presented by Respondent State of Washington in *Davis*, No. 05-5224 and Respondent State of Indiana in *Hammon*, No. 05-5705 in their respective merits briefs.

SUMMARY OF ARGUMENT

In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court redefined the "spatial reach" of the Confrontation Clause as it relates to out-of-court statements. The pre-*Crawford* paradigm, represented by *Ohio v. Roberts*, 448 U.S. 56 (1980), presupposed that the Clause reached *all* witness statements—both in-court and out-of-court. Therefore, the Clause's purpose was defined singularly in terms of a "'functional' right designed to promote reliability in the truth-finding functions of a criminal trial." *Kentucky v. Stincer*, 482 U.S. 730, 737 (1987). In the context of out-of-court statements, the question became whether the "truth-finding functions of a criminal trial," which devolved into a synonym for cross-examination, were "functionally-served" by something inherent in the class of hearsay evidence under consideration. If so, "cross-examination by substitution" had been effected and the Clause was not offended.

Crawford leaves intact the body of jurisprudence emanating from the "truth-finding functions of a criminal trial" in the context of in-court testimony and those out-of-court statements that are "testimonial" and, therefore, subject to the "spatial reach" of the Clause. *Crawford*, however, greatly constricted the "spatial reach" of the Clause with respect to out-of-court statements. No longer were the "truth-finding functional rights" operative at trial the lodestar. Rather, through the interpretive methodology of original meaning construction, this Court determined that the Framers *enlisted the aid* of these "truth-finding functions" to effectuate a very different purpose in the realm of out-of-court statements—to guard against *the government* creating "out-of-court testimony" against the accused *ex parte* and then introducing it at trial in lieu of live testimony. *Crawford*, 541 U.S. at 50. Based on experience, the Framers knew that this abuse could be unchecked by a less than impartial judicial gatekeeper.

The Confrontation Clause envisioned by the Framers, therefore, closed the door to this particular brand of governmental abuse by demanding that one who utters this "specific type of out-of-court statement" (*Id.* at 51) be seen for what he is—a "witness against" the "accused." The out-of-court statement, *judged from the moment of its creation*, is then and there the "functional equivalent" of in-court testimony and is, therefore, deemed "testimonial." It is the category of "testimonial" statements that defines the "spatial reach" of the Clause with respect to out-of-court statements. Once identified as "testimonial," the Clause demands that the out-of-court statement be subject to the same "truth-finding functional rights" operative at trial. Unless the government either brings the witness in or the accused had a prior opportunity to cross-examine the witness, the Clause operates as a categorical bar.

Thus, while the Confrontation Clause does enshrine "the truth-finding functional rights" that are fundamental to our adversarial system, the Clause has a decidedly different purpose in the realm of out-of-court statements. Here, the Clause was designed to act as a check on a very specific type of governmental abuse—conducting pre-trial *ex parte* examinations of witnesses and, thereby, creating evidence that would be used against the accused at trial. The foundational premises of both Petitioners' arguments, therefore, are in error. The definition of "testimonial" should not be defined in order to vindicate the "truth-finding, functional rights" of the Clause, as did the pre-*Crawford* paradigm and as Petitioners now advance. The definition of "testimonial" must logically be defined in terms of vindicating the purpose already identified by this Court in *Crawford* of acting as a check on governmental overreaching. Thus, the definition of "testimonial" cannot be unmoored from the very purpose of the Clause. It is within the confines of this purpose that this Court must assess whether the 911 call in *Davis* (No. 05-5224) and the crime disclosure statement in *Hammon* (No.

05-5705) are swept within the "spatial reach" of the Confrontation Clause as envisioned by our Framers.

This purpose of the Clause is reinforced by assessing its individual role in the overall purpose of the Sixth Amendment itself, the Bill of Rights as a whole and, indeed, the entire body of our Constitution. Employing the same original meaning interpretive methodology, in conjunction with constitutional construction principles, the Confrontation Clause's role within the larger constitutional body of guarding against governmental abuse emerges as the animating principle. The Framers envisioned a systemic response to governmental abuse—with each particular provision serving its designed purpose. To press the Clause into service to do the "heavy-lifting" in areas outside of its intendment would do damage to the overall balanced design. Therefore, when refining the definition of "testimonial," the Confrontation Clause simply cannot be unmoored from its overall purpose, particularly when there are other constitutional provisions better-suited and intended to accommodate the systemic concerns expressed by Petitioners.

This same interpretive methodology must also be employed to ascertain the "temporal reach" of the Confrontation Clause. Just as the Framers defined the "spatial reach" of the Clause, as it relates to out-of-court statements, by use of the phrase "witnesses against," the Framers also tied the "temporal reach" of the Clause to the term "accused" and the phrase "criminal prosecution." This text was deliberately employed by the Framers to extend the "temporal reach" of the Clause to effectuate its purpose. Neither the status of "accused," nor the "criminal prosecution" itself extends infinitely backwards. The history out of which the Clause was borne was the "pre-trial, *ex parte*" abuses of the government in creating and using out-of-court statements. Therefore, a "testimonial" statement must be "created" at some point on the investigatory/prosecutorial timeline when the

machinery of the State was focusing upon the "accused" as an "accused."

Through the same interpretive methodology employed to ascertain the "spatial reach" of the Clause, this Court can now flesh-out its "temporal reach." Moreover, this Court can and should synthesize its interpretation with its already-existing Sixth Amendment jurisprudence, which teaches that the purpose served by the individual right identifies the place on the timeline when the right is triggered. However, these Sixth Amendment rights all share the common principle that they are somehow tied to the "accused" as an "accused" within the machinery of a "criminal prosecution." Based on this interpretive methodology, both the 911 call *(Davis,* No. 05-5224) and the crime disclosure statement *(Hammon,* No. 05-5705) fall outside of the outer-limits of the "temporal reach" of the Confrontation Clause.

ARGUMENT

I. THE CONFRONTATION CLAUSE WAS DESIGNED TO GUARD AGAINST GOVERNMENTAL OPPRESSION; THEREFORE, ANY DEFINITION OF THE TERM "TESTIMONIAL" MUST INCLUDE THE GOVERNMENT PRODUCTION OF *EX PARTE* OUT-OF-COURT TESTIMONY.

The Confrontation Clause provides, "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." U.S. Const., amend. VI. In *Crawford v. Washington*, 541 U.S. 36 (2004), after over a quarter century of jurisprudence, this Court did an "about face" and reunited the Clause with its historical roots. Based upon an interpretive methodology of original meaning construction, through history, historical inference

and adherence to the text itself, this Court concluded that its previous presuppositions about the Clause, represented by *Ohio v. Roberts*, 448 U.S. 56 (1980), were unsupportable. The *Crawford* Court, therefore, threw out the entire pre-*Crawford* paradigm and instituted an entirely new framework that represented the true design of the Framers.

The pre-*Crawford* paradigm was premised upon the notion that the Clause was all-encompassing, reaching *all* witness statements—both in-court and out-of-court. Driven by Wigmore's postulate (*Coy v. Iowa*, 487 U.S. 1012, 1028-1029 (1988) (Blackmun, J., dissenting)), the Court reasoned that cross-examination was the "primary interest secured by [the Confrontation Clause]" because it is "critical for ensuring the integrity of the factfinding process." *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987). Cross-examination and the other "implications of the Confrontation Clause" (*Maryland v. Craig*, 497 U.S. 836, 863 (1990) (Scalia, J., dissenting))—placing the witness under oath and permitting the jury to look upon the witness' demeanor as he testifies (*California v. Green*, 399 U.S. 149, 158 (1970))—combined to "ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Lilly v. Virginia*, 527 U.S. 116, 123-124 (1999). Under this framework, the Confrontation Clause served to "protect[] * * * essentially a 'functional' right designed to promote reliability in the truth-finding functions of a criminal trial." *Stincer*, 482 U.S. at 737. The right of confrontation was found to be "an essential and fundamental requirement for the kind of trial which is this country's goal." *Lee v. Illinois*, 476 U.S. 530, 540 (1986).

Ironically, these purposes of the Clause, clearly effectual only if the witness actually took the witness stand at trial, were offered as the rationale for permitting and assessing out-of-court statements under the aegis of the Clause. The

reasoning went—if cross-examination is the purpose, and reliability is the goal, then an out-of-court statement can be sufficiently reliable to pass muster under the Clause if it "possess[es] indicia of reliability by virtue of its inherent trustworthiness" (*Idaho v. Wright*, 497 U.S. 805, 822 (1990)) such that "adversarial testing can be expected to add little to its reliability" (*White v. Illinois*, 502 U.S. 346, 357 (1992)). However, "[t]his reasoning abstracts from the right to its purposes, and then eliminates the right." *Craig*, 497 U.S. at 863 (Scalia, J., dissenting).

Pre-*Crawford* jurisprudence deliberately persevered in this fiction for more than a quarter century, finding it increasingly more and more difficult to develop a body of cohesive precedent. Moreover, the Court persisted in this paradigm, complete with multiple occasions of outright refusal to pay heed to the historical forces which drove the Framers to enshrine the Clause in the Bill of Rights in the first instance and/or the text of the Clause itself. See, *e.g.*, *Green*, 399 U.S. at 156-158; *Roberts*, 448 U.S. at 62-64; *Bourjaily v. United States*, 483 U.S. 171, 181-182 (1987); *Stincer*, 482 U.S. at 739-740; *White*, 502 U.S. at 352-353; *Lilly*, 527 U.S. 116. In its zeal to arrogate onto the Confrontation Clause the ability to monitor *all* hearsay, the Court in *White* went so far as to actually reject the Framers' own words in the text of the Clause because "[s]uch a narrow reading of the Confrontation Clause, [] would virtually eliminate its role in restricting the admission of hearsay testimony." *White*, 502 U.S. at 352.

In short, the pre-*Crawford* paradigm suffered from multiple logical systemic errors—all directly due to the preconceived desire to monitor all hearsay under the rubric of the Confrontation Clause. This framework simply refused to account for history, text, or purpose in construing the Clause. This Court, by employing an original meaning interpretive methodology, rectified the logical errors upon

which the pre-*Crawford* framework was premised and realigned the Clause with the Framers' intendment.

After an extensive review of the history of both England and the colonial periods leading up to the passage of the Bill of Rights, the Court determined that the "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Crawford*, 541 U.S. at 50. That is not to deny the laudable trial purposes of the Clause upon which the pre-*Crawford* body of jurisprudence rested. Certainly, these purposes are entirely accurate with respect to in-court testimony and those out-of-court statements that are found to come within the protective reaches of the Clause. This Court simply rejected these trial-related goals outright as somehow justifying if or how a particular out-of-court statement came within the rubric of Confrontation Clause scrutiny. What is clear is that the Framers did not erect the Confrontation Clause as a "reliability-gauge" for all out-of-court hearsay, as the pre-*Crawford* paradigm presupposed. Rather, through resort to the very history which forged the constitutional right and the Framers' expression of their intent through the text of the Clause itself, this Court concluded that the Confrontation Clause, with respect to out-of-court statements, was actually erected as a barrier against governmental abuse.

Certainly, post-*Crawford*, in the context of the trial itself, the Clause still represents "an affirmative guarantee that testimony introduced against an accused must be given under a prescribed procedure," as Petitioner Hammon rightly points out. (*Hammon*, No. 05-5705, Br. at 7; See also *Davis*, No. 5-5224, Br. 17, 35) Indeed, cross-examination and the other "implications of the Confrontation Clause"—the premises upon which the pre-*Crawford* paradigm were based—still represent the implicit "affirmative guarantees of the procedure described" (*Hammon*, No. 05-5705, Br. at 9)

within the Clause under the *Crawford* framework. This Court left the "truth-finding functions of a criminal trial" purpose intact with respect to in-court testimony. Obviously, the Clause affords an "accused" during the very "criminal proceeding" at which the "witness against" him is testifying the full protection of the procedural guarantee.

Moreover, *Crawford* "once again reject[ed] the view that the Confrontation Clause applies of its own force only to in-court testimony." *Id.* at 50. Thus, *when* an out-of-court statement (offered substantively) is deemed to come within the protective reaches of the Clause, these same "truth-finding functions of a criminal trial" are fully requisite, as well. Without either the witness on the stand or a prior opportunity for cross-examination and unavailability, the Clause erects a categorical barrier to the admission of that particular out-of-court statement.

However, the essential premise of both Petitioners and their *Amici*, that these "truth-finding functions" should be the benchmark for assessing *whether* an out-of-court statement should be swept within the "spatial reach" of the Clause, suffers from the same logical infirmity as the pre-*Crawford* paradigm. *Crawford* rejected this rationale outright because the history and text of the Clause demonstrated that *whether* an out-of-court statement came within the "spatial reach" of the Clause in the first instance was judged by a very different standard and was motivated by a very distinct purpose—to guard against the governmental abuse and overreaching that had periodically crept into their adversary system through the implementation of civil-law "controversial examination practices" actively employed by the government and unchecked by the judiciary. *Id.* at 47, 67.

To this end, the Framers enlisted the aid of the common law procedural trial right through the text of the Confrontation Clause to effectuate a very particular purpose with

respect to out-of-court statements—to guard against *the government* creating "out-of-court testimony" against the accused *ex parte*. The abuse began when the government created the "*ex parte* examination" of the witness and was completed when it was introduced "as evidence against the accused" at his trial in lieu of live testimony. In this manner, the government subverted the accused's right to employ, at trial, the arsenal of "truth-finding functions" on a live body on the witness stand. It is this governmental creation of out-of-court testimony in order to end-run the procedural guarantees of the Confrontation Clause at trial that constituted the abuse.

Moreover, the Framers were none too comforted by the fact that the out-of-court, government-created "testimony" would pass through a judicial gate-keeper, given their equal distrust of a judiciary beholden to the King. The reality of this fact played out before their very eyes in the "politically charged cases like Raleigh's—great state trials where the impartiality of even those at the highest level of the judiciary might not be so clear." *Id.* at 67. In short, the Framers "knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people" so "they were loathe to leave too much discretion in judicial hands." *Id.* at 67.

The Confrontation Clause envisioned by the Framers, therefore, closed the door to this particular brand of governmental abuse by demanding that one who utters this "specific type of out-of-court statement" (*Id.* at 51) be seen for what he is—a "witness against" the "accused." As such, when this particular type of out-of-court statement, termed "testimonial," is identified, it is subject to the same trial-type adversarial testing mandated by the Confrontation Clause for in-court testimony. If the witness is not put on the stand or the accused had not had a prior opportunity to subject the out-of-court statement to the rigors of adversarial testing, the statement is categorically barred by the Confrontation Clause.

Crawford, therefore, through its original meaning interpretive methodology, attempted to lay out the "common nucleus" and "various levels of abstraction around it" (*Id.* at 51-52) of the "spatial reach" of the Clause—those out-of-court "testimonial" statements that are generated by "the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed" (*Id.* at 68). Petitioners have proposed the following tests to identify these "specific type[s] of out-of-court statements": "whether a reasonable person in the position of the declarant would anticipate use of the statement in investigation or prosecution of a crime" (*Hammon*, No. 05-5705, Br. at 7) and "whether a *reasonable declarant* would have *anticipated* that her statement might be used for law enforcement purposes" (Emphasis in original) (*Davis*, No. 05-5224, Br. at 41). While *Amicus* has grave concerns about these tests for multiple reasons[1], *Amicus* would like to focus particularly upon

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[1] Petitioners' proposed tests are decidedly atextual and ahistorical. Given this Court's methodology of ascertaining the meaning of the phrase "witnesses against," Petitioners' contentions that this phrase seeks to ascertain whether the statement at issue would perform the *function* of testimony when it is introduced at trial (*Hammon*, Br. at 12-13; *Davis*, Br. at 41) misses the mark. The question is whether the out-of-court statement, at the moment of its utterance, *is* the functional equivalent of in-court testimony at the time the statement is made. Petitioners' focus upon content is, again, contrary to the history and text of the Clause. The term "accused" is a very different thing than an "accusation." If Petitioners are correct, then this Court's characterization of the out-of-court accusation in *Dutton v. Evans*, 400 U.S. 74 (1970) as "nontestimonial" (*Crawford*, 541 U.S. at 57) would be error. In addition to the requisite governmental abuse component, what makes the out-of-court statement "testimonial" is the simultaneous understanding of the declarant that he was "bearing witness against the accused" at that time, drawn from the circumstances under which the statement was created. If this were not correct, then

(continued...)

Petitioners' suggestion that the definition of "testimonial" can be completely unhinged from any manner of governmental involvement in the creation of the out-of-court statement. (*Hammon*, No. 05-5705, Br. at 10, 11, 17; *Davis*, No. 05-5224, Br. at 13)

As stated, this conclusion necessarily derives from Petitioners' view of the purpose of the Confrontation Clause, as it relates to out-of-court statements, as a free-roving guarantor of our adversarial principles upon out-of-court statements that might end up in-court as prosecution "testimony." If the out-of-court statement accuses the "accused,"[2] then it should be subject to the rigors of adversarial testing else our adjudicative system will come into disrepute. In other words, Petitioners' theories rest upon the commentary on our adjudicative system that would result should it not be deemed to interpret the term "witnesses against" utilized by the Framers in the manner proposed by Petitioners.

Amicus has already pointed out that this rationale shares much in common with the pre-*Crawford* framework already rejected by this Court in *Crawford*. While admittedly packaged somewhat differently, both share the overall premise that the advancement of the truth-determining process is the purpose of the Clause and, therefore, the end in and of itself in the realm of out-of-court statements. More

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(...continued)
this Court's characterization of the declarant's statement to the F.B.I informant in *Bourjaily v. United States*, 483 U.S. 171 (1987) as "nontestimonial" (*Crawford*, 541 U.S. at 58) would be equally called into question. Finally, both proposed tests do not even attempt to account for the "temporal reach" of the Clause, which will be more fully addressed below.

[2] Upon careful scrutiny, the actual tests proposed by Petitioners are not even limited to out-of-court "accusations." For this reason alone, much of Petitioner's rationale surrounding the significance of accusations is not logically integral to their ultimate conclusions.

importantly, however, Petitioners' ideological misgivings aside, this Court has already identified the Framers' intent with respect to the Clause's role in the regulation of out-of-court statements as one of guarding against "the civil-law mode of criminal procedure and particularly its use of *ex parte* examinations as evidence against the accused." *Id.* at 50. While Petitioner Hammon attempts to employ this conclusion to underscore his operating premise (See *Hammon*, No. 05-5705, Br. at 11, n. 7 ("the Court's statement in *Crawford* that 'the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused' (citation) should be interpreted in this light")), his efforts are unavailing for the simple reason that he refuses to accept that this Court has already identified the Framers' purpose with respect to out-of-court statements—a purpose very different than the one upon which Petitioners' arguments are premised.

This Court found that the Clause, within the realm of out-of-court statements, was designed to effect a check against the government's employment and use of civil law, pre-trial examinations of witnesses to end-run the procedural guarantees of the Confrontation Clause. It was the Framers' fear of governmental abuse, both at the hands of the investigatorial/prosecutorial entities, during the pre-trial phase of the "criminal prosecution," and the judiciary, during the trial itself, out of which the Confrontation Clause was forged.[3] The purpose of the Clause, therefore, was not

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[3] Petitioner Hammon asserts that "it is not the police or prosecutors or other questioners who violate the confrontation right." Rather, the abuse occurs "when a court admits the statement in support of a prosecution without the accused having an opportunity to confront the witness." (*Hammon*, No. 05-5705, Br. at 17) In other words, the abuse occurs at trial alone. In reality, (continued...)

simply to glorify the adversarial process in and of itself but, in the specific context of out-of-court statements, to guard against governmental abuse. As a result, the government evidence-producing component simply cannot be written out of the "testimonial" equation.

That guarding against governmental abuse is the animating purpose of the Confrontation Clause, as it relates to out-of-court statements, is clear from this Court's interpretive original meaning methodology employed in *Crawford*. The Confrontation Clause was designed to afford an "accused" a procedural mechanism to effect a balance of power between himself and the machinery of the State so as to "safeguard[] against the restoration of proceedings which were so oppressive and odious while they remained in force." *United States v. Reid*, 53 U.S. 361, 364-365 (1852).

As one commentator aptly explained this, "the procedural dimension," of confrontation doctrine is "based on an unstated assumption that the right of confrontation restricted the ability of the government to create and use hearsay as a substitute for live testimony." Roger W. Kirst, *The Procedural Dimension of Confrontation Doctrine*, 66 Neb. L. Rev. 485, 487 (1987) (hereinafter, "Kirst, *The Procedural Dimension*"). "The use of hearsay most closely resembles trial by affidavit when the hearsay is created by

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(...continued)

Professor Friedman's construct is an effort to account for Professor Amar's earlier observation that Friedman's theory "sidesteps a powerful counterargument rooted in a basic principle of constitutional structure: the Constitution is mainly addressed to state action." Akhil Reed Amar, *Confrontation First Priniciples: A Reply to Professor Friedman*, 86 Geo. L.J. 1045, 1048 (1998). To solve his "state action" problem, Friedman has created another problem—he has ignored the very purpose of the Clause in the realm of out-of-court statements. The abuse consists of *both* the creation of *ex parte* testimony during the pre-trial process *and* the introduction of it at trial.

the government in the investigation or prosecution of the crime." This "procedural dimension," moreover, "has always been an integral, but implicit, part of confrontation doctrine." Kirst, *The Procedural Dimension*, 66 Neb. L. Rev. at 487.

Moreover, this purpose—to keep the power of the government in check—only becomes clearer when viewing this Clause as a component part of the Sixth Amendment itself. The purpose of the Confrontation Clause identified by this Court in *Crawford* fits seamlessly with fundamental principles of constitutional construction on a larger scale. The Clause cannot be interpreted in a vacuum, located as it is within the Sixth Amendment, as a whole, which provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have Assistance of Counsel for his defence." U.S. Const., amend. VI.

Petitioners are correct in the sense that the Sixth Amendment "includes a compact statement of the rights necessary to a full defense[,]" which rights "are basic to our adversary system of criminal justice." *Faretta v. California*, 422 U.S. 806 (1975). However, this Court's jurisprudence with respect to other individual rights within the Sixth Amendment indicates that these, too, were erected by the Framers as a systemic check on governmental abuse. For example, in *Klopfer v. North Carolina*, 386 U.S. 213, 221-222 (1967), this Court found that the Framers viewed the right to speedy trial served to guard against governmental procedures that "indefinitely prolong[ed]" the "oppression" inherent in the

"pendency of [an] indictment." The right to a public trial, emanating from the "Anglo-American distrust for secret trials has been ascribed to the notorious use of this practice * * * * [by] institutions [which] obviously symbolized a menace to liberty," was "recognized as a safeguard against any attempt to employ ours courts as instruments of persecution" because "[t]he knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *In re Oliver*, 333 U.S. 257, 268-269 (1948). Similarly, this Court, based upon an assessment of the history of jury trial at the time of our Founding Fathers, stated that "the guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). See also *Singer v. United States*, 380 U.S. 24, 31 (1965) (Art. III, § 2 jury trial clause "was clearly intended to protect the accused from oppression by the Government"); *Ring v. Arizona*, 536 U.S. 584, 611-612 (2002) (Scalia, J., concurring).[4]

The Framers deliberately elected to "bundle" these Sixth Amendment rights together as a package. This Court has employed the same interpretive methodology in discerning the Framers' intent with respect to these other Sixth Amendment rights and came to the same conclusion as it did in *Crawford* with respect to the Confrontation Clause: that these Sixth Amendment rights, the defining characteristics

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[4] The Compulsory Process Clause, too, was enshrined in the Bill of Rights to guard against governmental oppression. This Clause was included in the Sixth Amendment "in reaction to the notorious common-law rule that in cases of treason or felony the accused was not allowed to introduce witnesses in his defense at all." *Washington v. Texas*, 388 U.S. 14, 19 (1967).

of our adversary system, were also enshrined by the Framers to act as checks on governmental overreaching in both the executive and judicial departments.

Moreover, grouped, as they are, within the Sixth Amendment as a package, "each Sixth Amendment guarantee should be interpreted in light of the rest of the Sixth Amendment," the "package" of personal procedural guarantees "dovetail[s] to construct a forum that will not only find facts, but will also be a check on governmental overreaching." Randolph N. Jonakait, *Notes for a Consistent and Meaningful Sixth Amendment*, 82 J. Crim. L. & Criminology 713, 734-735 (1992). In short, the Confrontation Clause plays a "supporting role * * * in restraining the capricious use of government power." Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 Minn. L. Rev. 557, 560 (1992) (hereinafter, "Berger, *Prosecutorial Restraint*"); See also *Taylor v. Illinois*, 484 U.S. 400, 410 (1988) (Sixth Amendment rights, with the exception of compulsory process, "shield the defendant from potential prosecutorial abuses"); *Duncan*, 391 U.S. at 154 ("Those who emigrated to this country from England brought with them this great privilege [of jury trial] 'as part of their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.'") (citations omitted).

This interpretation of the Clause is given further textual support by its location within the Bill of Rights. In the words of commentator Akhil Reed Amar, "much is lost by the clause-bound approach that now dominates constitutional discourse." Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131 (1991). "Perhaps as a consequence of the parceling out of constitutional issues among several law school courses, the particular guarantees of the amend-

ments have been studied in a fragmented manner that obscures the grand design of the Bill of Rights and its relationship to the Constitution, and is at odds with ordinary canons of statutory analysis." Berger, *Prosecutorial Restraint*, 76 Minn. L. Rev. at 560.

Thus, again in keeping with fundamental constitutional construction principles, the Confrontation Clause must also be interpreted in conjunction with the Bill of Rights and, indeed, the Constitution as a whole. It has been said that "the Bill of Rights was never intended to serve as a source of government power. Rather, its *raison d'etre* is to function as a limitation on that power." Edward J. Imwinkelried, *The Constitutionalization of Hearsay: The Extent to Which the Fifth and Sixth Amendments Permit or Require the Liberalization of Hearsay Rules*, 76 Minn. L. Rev. 521, 538 (1992). "The Bill of Rights [is] a political document with a principal objective of restraining the power of the government *vis-a-vis* the individual." Berger, *Prosecutorial Restraint*, 76 Minn. L. Rev. at 561; See also *Benton v. Maryland*, 395 U.S. 784, 795-796 (1969) ("underlying notion" of the Double Jeopardy Clause, that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense" is one that "has from the very beginning been part of our constitutional tradition"); *Doe v. United States*, 487 U.S. 201, 212 (1988) (Fifth Amendment privilege against self incrimination, "[h]istorically, * * * was intended to prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him" and, therefore, "[t]he major thrust of the policies undergirding the privilege is to prevent such compulsion."); *Malloy v. Hogan*, 378 U.S. 1, 22 (1964) ("It follow[s] from the recognition that due process encompassed the fundamental safeguards of the individual against the abusive exercise of governmental power that some of the restraints on the Federal Government which were specifically enumerated in the Bill of

Rights applied also against the States."); *Reid v. Covert*, 354 U.S. 1, 44 (1957) (Frankfurter, J., concurring) ("The Constitution is an organic scheme of government to be dealt with as an entirety. A particular provision cannot be dissevered from the rest of the Constitution.").

Again, this Court's jurisprudence bears this out. In *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955), this Court explained that "[t]he Constitution and the Amendments in the Bill of Rights show that the Founders were not satisfied with leaving determination of guilt or innocence to judges, even though wholly independent [by virtue of Article III]. * * * * Other safeguards designed to protect defendants against oppressive governmental practices were included." Similarly, in *Hurtado v. California*, 110 U.S. 516, 531-532 (1884), this Court early on recognized that:

> "[t]he concessions of Magna Charta were wrung from the King as guarantees against the oppressions and usurpations of his prerogative. * * * * In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into Bills of Rights. They were limitations upon all the powers of government, legislative as well as executive and judicial."

Perhaps *Amicus*' point could not be better encapsulized by the following statement by this Court: "The rights and liberties which citizens of our country enjoy are not protected by custom and tradition alone, they have been jealously preserved from the encroachments of Government by express provisions of our written Constitution," which this Court described as "the remarkable collection of 'Thou shalt nots' which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments." *Reid v. Covert*, 354 U.S. at 6-7, 9.

Therefore, fundamental principles of constitutional construction lend further support to the fact that the *Crawford* Court correctly viewed the Confrontation Clause as a check on governmental oppression in the realm of out-of-court statements. The Clause, like the remainder of the Sixth Amendment, the Bill of Rights and the Constitution itself, was designed to guard against the government abuse while acting within its awesome powers against the individual. In perfect harmony with this design, this Court in *Crawford* identified the historical force which drove the Clause: the "involvement of government officers in the production of testimony with an eye toward trial [that] presents unique potential for prosecutorial abuse—a fact borne out time and time again throughout a history with which the Framers were keenly familiar." *Crawford*, 541 U.S. at 56, n. 7. It was not abuse by the executive body alone, however, that the Framers employed the Confrontation Clause to check. The Framers "knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people" and they were, therefore, "loathe to leave too much discretion in judicial hands." *Id.* at 67-68. The Confrontation Clause, therefore, erects a categorical barrier against the creation of *ex parte* testimony by the executive body against the accused because the Framers also "had an eye toward politically charged cases like Raleigh's—great state trials where the impartiality of even those at the highest level of the judiciary might not be so clear." *Id.* at 68.

Thus, to suggest, as Petitioners do, that the definition of "testimonial" statements need not include any government-production-of-evidence component is simply error of the highest degree. Their premise, that our system of adversarial adjudication might be compromised if this Court were to faithfully interpret the purpose of the Confrontation Clause as a check on governmental oppression in the realm of out-of-court statements simply misses the mark.

Whether or not Petitioners like it, this is the adversarial system that our Framers set up—one that was forged from a distinct historical focus and purpose and defined specifically by the actual words of the text of the Clause itself and its role within the larger constitutional scheme. To interpret the Clause in the manner Petitioners advocate would drag it out of its natural role within the system set up by the Framers and require it to do all the "heavy lifting" outside of its natural intendment. Petitioners neglect to account for the fact that other constitutional provisions were designed to and are better-suited to accommodate Petitioners' concerns. As discussed above, the Constitution itself was designed by the Framers to *systemically* guard against governmental oppression—a system that operates most effectively when each provision operates within its own sphere and according to its own purpose and design.

This Court has already identified the purpose of the Confrontation Clause within this system: to guard against "the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Id.* at 50. As this Court recognized long ago,

> "Legal doctrines are not self-generated abstract categories. * * * They have a specific juridical origin and etiology. They derive meaning and content from the circumstances that gave rise to them and from the purposes they were designed to serve. To these they are bound as is a live tree to its roots." *Reid v. Covert*, 354 U.S. at 50 (Frankfurter, J., concurring).

Amicus, therefore, urges this Court not to unmoor the definition of "testimonial" from the purpose and intendment of our Framers, as Petitioners would have this Court do.

II. THE "TEMPORAL REACH" BACKWARDS OF THE CONFRONTATION CLAUSE WITHIN THE PRE-TRIAL PROCESS SHOULD BE SYNTHESIZED WITH THIS COURT'S ALREADY-DEVELOPED SIXTH AMENDMENT JURISPRUDENCE.

In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court employed an original meaning interpretive methodology to ascertain the "spatial reach" of the Confrontation Clause as it relates to out-of-court statements, by focusing upon the purpose of the Clause and the text itself with respect to the phrase "witnesses against." *Amicus* now urges this Court to address itself to the "temporal reach" of the Clause by employing this same methodology to ascertain the meaning of the term "accused" and the phrase "criminal prosecution." Fortunately, this Court has already built up a large body of jurisprudence in this regard with respect to several other constitutional rights contained also in the Sixth Amendment. In keeping with the principles of constitutional construction, *Amicus* urges this Court to synthesize the meaning of these phrases within the Confrontation Clause with the already-developed principles of Sixth Amendment jurisprudence, generally.

The Framers employed the phrase "witnesses against" within the text of the Clause to delimit what type of out-of-court statements come within its reach. *Crawford*, in essence, was a roadmap for identifying "the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Id.* at 68. Because *Crawford* focused on the crucial phrase "witnesses against," it sought to identify the *qualities* that a particular out-of-court statement must possess in order to come within the "spatial reach" of the Clause.

The text of the Clause, however, also contains terminology identifying the "temporal reach" of the Clause. An *ex parte* statement and "controversial examination practices" (*Id.* at 47)—necessarily presuppose "parties," in the first instance, and "involvement of government officers in the production of

testimony with an eye toward trial" (*Id.* at 56, n. 7), in the second instance. These phrases, of necessity, carry with them temporal qualities, identifying the relative place on the investigatory/prosecutorial timeline during which an out-of-court statement must be produced in order to qualify as "testimonial." The two "reaches" of the Clause—both spatial and temporal—in fact, dovetail to identify a relative point on the investigatory/prosecutorial timeline that a statement must be uttered in order to qualify as "testimonial."

Thus, any test for the definition of "testimonial" must also account for the "temporal reach" of the Clause intended by the Framers. Surely, the history and historical inferences of the Clause identified in *Crawford* indicate that the statements must come into existence during the *pre-trial* process—at some point in time when the government, police or prosecutor— is actually preparing its case against the accused. If Petitioners are correct in their proposed tests for the definition of a "testimonial" statement, then the absence of any governmental involvement whatsoever would permit the category of out-of-court statements to extend backwards in time to a point outside of the temporal limits of the *pre-trial* process.[5] Petitioner Hammon refers to a scenario where a private party relays information about an offense to another private party before the authorities are even aware of the offense, much less in the *pre-trial* stage of the prosecution. (*Hammon*, No. 05-5705, Br. at 11) Petitioner Davis defines his test in terms of "whether declarants reasonably would have anticipated that their statements might be used for law enforcement purposes." (*Davis*, No. 05-5224, Br. at 13) A statement might be made well in advance of a *pre-trial* stage and still be used, at some point

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[5] In fact, Petitioner Hammon describes a determination that an out-of-court statement was "nontestimonial" as "quite startling" (*Hammon*, No. 05-5705, Br. at 20)—where the statement was made nearly two years *prior* to the offense. See, *Hammon*, No. 05-5705, Br. at 20, n. 20, citing *State v. Barnes*, 854 A.2d 208, 210-12 (Me. 2004).

further along the timeline, "for law enforcement purposes." Quite simply, Petitioners advocate definitions of "testimonial" that are well beyond the reaches of the Clause "spatially," as discussed above, *and* "temporally," as well.[6]

Moreover, the relative point on the investigatory/prosecutorial timeline for an out-of-court statement to come within the "temporal reach" of the Clause is also indicated by an examination of the text of the Clause, as this Court undertook in *Crawford*. In addition to the phrase "witnesses against," which this Court explained in *Crawford*, the Clause also speaks to an "accused" during a "criminal prosecution." This Court, however, has already developed a body of jurisprudence regarding the meaning of these words and their relationship in the context of other Sixth Amendment rights. Therefore, because the term "accused" and the phrase "criminal prosecution" speak commonly to all the Sixth Amendment rights, principles of constitutional construction dictate that the meaning ascribed to this text in the context of the Confrontation Clause must somehow be unified, in principle, with Sixth Amendment jurisprudence.

In *United States v. Wade*, 388 U.S. 218 (1967), this Court addressed itself to the application of the Sixth Amendment right to counsel in the context of a post-indictment lineup, concluding that "the Sixth Amendment guarantee [of counsel] appl[ies] to 'critical' stages of the proceedings." *Id.* at 224.

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[6] As discussed in footnote 3, Petitioner Hammon's position is that the abuse occurs at trial when the court admits the out-of-court statement. This may, superficially, counter Petitioner's "temporal reach" problem. However, Petitioner's entire theory rests upon an erroneous premise, refusing to take this Court's identification of the abuse at which the Clause was directed at face value. The abuse consists of *both* the creation of "*ex parte* examinations" during the pre-trial process *and* the introduction of that examination into evidence at trial. Petitioner cannot obviate his "temporality" problem by simply crafting another purported abuse which happens to occur only at the trial itself.

Finding that the right applied to this government procedure, this Court reasoned that, "in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *Id.* at 226. In refining this principle, however, this Court in *Kirby v. Illinois*, 406 U.S. 682 (1972), explained that the right to counsel is triggered "at or after the initiation of adversary judicial criminal proceedings" because this "is the starting point of our whole system of adversary criminal justice." The *Kirby* Court continued:

> "The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable." *Id.* at 689; See *Gerstein v. Pugh*, 420 U.S. 103, 121 (1975) ("Because of its limited function and its nonadversary character, the probable cause determination is not a 'critical stage' in the prosecution that would require appointed counsel.").

Thus, the *Kirby* Court keyed upon the explicit term "criminal prosecutions" within the text of the Sixth Amendment and the purpose of the particular right at issue, in determining how far, temporally, the right to counsel contained in the Sixth Amendment reached backwards on the prosecutorial timeline.

In *United States v. Ash*, 413 U.S. 300 (1973), this Court made explicit what had been implicit in prior precedent. The *Ash*

Court explained that, while the "historical background [of the right to counsel] suggests that the core purpose of the counsel guarantee was to assure 'Assistance' at trial, * * * [l]ater developments have led this Court to recognize that 'Assistance' would be less than meaningful if it were limited to the formal trial itself." *Id.* at 309. Further, "[t]his extension of the right to counsel to events before trial has resulted from changing patterns of criminal procedure and investigation that have tended to generate pretrial events that might appropriately be considered to be parts of the trial itself." *Id.* at 311. However, this Court in *Ash* refused to extend this right to a post-indictment photo display identification, even though it fell within the "temporal reach" of that constitutional provision, because the purpose the right to counsel was designed to serve in the pretrial arena was not at issue in the procedure under scrutiny. *Id.* at 317-321; See also *Maine v. Moulton*, 474 U.S. 159, 176 (1985) ("[T]he Sixth Amendment [right to counsel] is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached.").

Finally, in *United States v. Gouveia*, 467 U.S. 180 (1984), this Court tied the entire jurisprudential rationale for the attachment of the right to counsel to the purpose and text of the Amendment. In declining to find that the right to counsel attached while petitioners were in prison administrative detention but before the return of indictments against them, the Court held fast to its "initiation of adversary judicial proceedings" rule as the point on the prosecutorial timeline in which the right to counsel attaches. The *Gouveia* Court explained, "[t]hat interpretation of the Sixth Amendment right to counsel is consistent not only with the literal language of the Amendment, which requires the existence of both a 'criminal prosecution' and an 'accused,' but also with the purposes which we have recognized that the right to counsel serves." *Id.* at 188; See also *Michigan v. Jackson*, 475 U.S. 625, 632 (1986) ("after a formal accusation has been made—and a person who had

previously been just a 'suspect' has become an 'accused' within the meaning of the Sixth Amendment—the constitutional right to the assistance of counsel is of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation.").

Perhaps to make matters clear, this Court subsequently, in *Moran v. Burbine*, 475 U.S. 412 (1986), refused to extend the right to counsel further back in time to a prearraignment confession, even when an attorney retained by the defendant's sister was misled while trying to get in contact with the defendant and in the face of argument that "police questioning often seals a suspect's fate" (*Id.* at 431-432). This Court explained:

> "[The] purpose [of the right to counsel] is to assure that in any 'criminal [prosecution]' (emphasis in original) U.S. Const., Amdt. 6, the accused shall not be left to his own devices in facing the 'prosecutorial forces of organized society.' (citations omitted) By its very terms, it becomes applicable only when the government's role shifts from investigative to accusation. For it is only then that the assistance of one versed in the 'intricacies of the law' (citations omitted) is needed to assure that the prosecution's case encounters 'the crucible of meaningful adversarial testing.' (citation omitted)" *Id.* at 430.

As this body of Sixth Amendment right to counsel jurisprudence reveals, this Court has taken great pains to temporally tie the text of the Sixth Amendment to the particular pre-trial governmental form of oppression against which the right was meant to guard. Because the Sixth Amendment right to counsel is one of "Assistance" at trial, it only reaches back into the pre-trial prosecutorial process to a point where the "government's role shifts from investigative to accusation" because, at this moment—the initiation of adversarial judicial proceed-

ings—counsel is needed to act as an "equalizer" between the machinery of the government and the accused. Without counsel at this point in the process, the "accused's" right to the "Assistance" of counsel at trial would be meaningless. However, and importantly, even if the pre-trial abuse occurs within the "temporal reach" of the right to counsel, the right is not automatically triggered. It is only triggered when the governmental abuse at issue has a nexus to the purpose for which the right was designed.

In the context of another Sixth Amendment right, the right to speedy trial, this Court's rationale remains the same. In *United States v. Marion*, 404 U.S. 307, 314 (1971), this Court stated that, "[o]n its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution." However, the *Marion* Court extended this right backward on the investigatory/prosecutorial timeline to "the actual restraints imposed by arrest and holding to answer a criminal charge." *Id.* at 320. In keeping with the methodology devised in the context of the Sixth Amendment right to counsel, because the right to speedy trial served to guard against governmental procedures that "indefinitely prolong[ed]" the "oppression" inherent in the "pendency of [an] indictment" (*Klopfer v. North Carolina*, 386 U.S. 213, 221-222 (1967)), the Court determined that the "public act" on the part of the government in arresting someone would visit oppression upon an arrestee similar to that visited upon one who is charged and, therefore, an "accused." *Id.* at 320. The *Marion* Court, however, refused to extend this right further backwards to pre-indictment because "until [arrest], a citizen suffers no restraints on his liberty and is not the subject of public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer." *Id.* at 321.

Thus, some clear principles emerge from examining this Court's jurisprudence in the context of the Sixth Amendment

rights to counsel and speedy trial. In both cases, this Court recognized the fact that the rights were organized around the "criminal proceeding" itself. The "accused" then is understood to be an "accused," at a point on the investigatory/prosecutorial timeline when the "machinery of the State" trains its sights upon the individual. However, as demonstrated above, this Court has been careful to tie the initiation of the particular right during the pre-trial phase to a point in time, specific to the right itself, when the governmental oppression against which the right serves to guard can jeopardize the trial interests served by the right. In the context of right to counsel, it was "to protect the accused during trial-type confrontations with the prosecutor" (*Gouveia*, 467 U.S. at 190) while, with the right to speedy trial, the purpose was to guard against the oppression inherent in the government's "public act" of arrest (*Marion*, 404 U.S. at 320). However, it is not enough that the purported "abuse" occur within the "temporal reach" of the constitutional provision at issue. The "abuse" must also be committed by the government and must share a nexus with the purpose and abuse against which the particular right was designed to guard.

So, too, should this Court employ this same method of analysis when ascertaining the "temporal reach" backward of the Confrontation Clause, given that it shares the same constitutional amendment as the rights to counsel and speedy trial. This Court should interpret the term "accused" and the phrase "criminal proceeding" in keeping with the history and the purpose the Confrontation Clause was designed by the Framers to serve in the context of out-of-court statements. As the Clause was "directed [at] the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused," (*Crawford*, 541 U.S. at 50), this Court should fix the "temporal reach" of the Clause to a point during the *pre-trial* process when the investigatory/prosecutorial machinery of the State is in a position to produce this type of "examination." However, it is not enough to come within the "temporal reach" of the Clause,

as this Court's Sixth Amendment jurisprudence teaches. The statement must also be created by the government, *ex parte*, with an eye toward the "accused's" "criminal prosecution." In other words, the "spatial reach" of the Clause discussed in Section I of *Amicus*' argument, and the "temporal reach" of the Clause, discussed herein, will necessarily dovetail when an out-of-court statement is truly "testimonial."

Petitioners' position that a "testimonial" statement can be made even prior to the *pre-trial* phase—when the investigatory/prosecutorial machinery of the government has not yet even considered mobilizing against the "accused" to gear up for a "criminal proceeding"—should be rejected out of hand. Wherever this Court decides to fix the "temporal reaches" of the Clause on the investigatory/prosecutorial timeline, both the 911 call (*Davis*, No. 05-5224) and the disclosure of a crime to the first responding officer (*Hammon*, No. 05-5705) clearly fall outside of both the "spatial reach" *and* the "temporal reach" of the Confrontation Clause. In addition to not being government-produced whatsoever and, therefore, not qualitatively "testimonial," in both instances, the investigatory/prosecutorial machinery of the State could not have possibly been focusing upon the defendants as "accuseds" in "criminal prosecutions" within Sixth Amendment jurisprudence. Both the 911 call and the crime disclosure statement were the first revelations to the authorities that a potential crime had even been committed. The police were not even within the pre-trial process when these statements were made, much less focusing upon these men as "accuseds" in preparation for their "criminal prosecutions." The statements simply fall outside of the "temporal reach" of the Confrontation Clause, as defined by history, text, and this Court's own Sixth Amendment jurisprudence.

CONCLUSION

For the reasons set forth above, this Court should affirm the judgments in *Davis* (05-5224) and *Hammon* (05-5705).

Respectfully submitted,

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In the Supreme Court of the United States

HERSHEL HAMMON, PETITIONER,

v.

STATE OF INDIANA, RESPONDENT.

ADRIAN MARTELL DAVIS, PETITIONER,

v.

STATE OF WASHINGTON, RESPONDENT.

On Writs of Certiorari to the Indiana Supreme Court and the Supreme Court of Washington

BRIEF FOR THE STATES OF ILLINOIS, ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, IDAHO, KANSAS, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSOURI, NEBRASKA, NEVADA, NEW MEXICO, OHIO, OKLAHOMA, SOUTH DAKOTA, TEXAS, UTAH, VERMONT, WEST VIRGINIA AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether an oral accusatory statement made to an investigating officer at the scene of a crime, or a victim's statement to a 911 operator naming her assailant, are governed by *Crawford v. Washington*, 541 U.S. 36 (2004), where the statements qualify as excited utterances under state law.

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INTEREST OF THE *AMICI CURIAE*

These cases ask whether two out-of-court statements — an oral accusation made to a police officer at the scene of a crime, and a victim's statement to a 911 operator naming her assailant — are governed by *Crawford v. Washington*, 541 U.S. 36 (2004), where the statements qualify as excited utterances under state law. Because the 27 State *amici curiae* have traditionally allowed the admission of excited utterances, the decisions here will substantially impact the admissibility of such statements in a wide variety of criminal cases, including those concerning domestic violence and crimes against children.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Confrontation Clause, as interpreted in *Crawford*, prohibits the admission of "testimonial" out-of-court statements by a declarant absent from trial, unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination. 541 U.S. at 59. This rule is subject to two important limitations. First, *Crawford* does not govern nontestimonial hearsay. *Id.* at 68 ("[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law"). Second, *Crawford* does not govern hearsay, whether testimonial or not, of a type that was admissible at common law and thus incorporated into the Sixth Amendment. *Id.* at 56 n.6; see also *Mattox v. United States*, 156 U.S. 237, 243 (1895).

These cases concern the admission at trial of out-of-court statements found to qualify as excited utterances under state law. In *Hammon*, a police officer testified that he arrived at a reported domestic disturbance, where the declarant told him that her husband, petitioner Hammon, had just shoved her head into broken glass and twice punched her in the chest. Hammon

J.A. 82. The state appellate court held that the officer's testimony did not violate the Confrontation Clause, reasoning that the declarant's statement was an excited utterance and that excited utterances, by definition, are not testimonial under *Crawford*. *Id.* at 77 ("the very concept of an 'excited utterance' is such that it is difficult to perceive how such a statement could ever be 'testimonial'"). The state supreme court declined to adopt that *per se* rule, *id.* at 95, but held on other grounds — focusing upon the declarant's motivation in speaking to the officer, the officer's motivation in communicating with the declarant, and whether the officer's motivation rendered the communication a species of "police interrogation" whose fruits are subject to *Crawford*, see 541 U.S. at 53-54, 68 — that the statement was nontestimonial. Hammon J.A. 100-104.

In *Davis*, the victim called 911, hung up before saying anything, and then was called back by the 911 operator, who asked what was happening. Davis J.A. 117. The victim "was hysterical and crying as she responded, 'He's here jumpin' on me again,'" and identified petitioner Davis as her assailant. *Ibid.* The victim did not appear at trial, and the trial court, over Davis's objection, admitted a tape recording of the 911 call under the excited utterance doctrine. *Id.* at 118. The state appellate court affirmed, applying the then-applicable framework of *Ohio v. Roberts*, 448 U.S. 56 (1980). Davis J.A. 96-111. While the matter was on appeal to the state supreme court, *Crawford* was decided. *Id.* at 120. The state supreme court held that admitting the 911 tape did not violate *Crawford*. Noting that a California intermediate appellate court had held that "it is difficult to perceive any circumstances under which a statement qualifying as an excited utterance would be testimonial," *id.* at 125 (citing *People v. Corella*, 122 Cal. App. 4th 461, 18 Cal. Rptr. 3d 770 (2004)), the state supreme court, like its counterpart in *Hammon*, did not adopt a *per se* rule in that regard. Rather, the court focused on the declarant's

motivation when speaking to the 911 operator in holding that her statement was not testimonial. Davis J.A. 125-128.

Both state supreme courts were correct to rule that the statements were properly admitted, and the grounds articulated by respondents Indiana and Washington amply support the judgments below. However, to conclude that the declarants' statements were proper under *Crawford*, this Court need not examine, let alone resolve, potentially difficult questions regarding the officer's and 911 operator's respective motivations in communicating with the declarants and whether their motivations rendered the communications "police interrogations" within the meaning of *Crawford*. Rather, for purposes of these cases, this Court need only hold that excited utterances are *per se* not governed by *Crawford*. See *United States v. Arnold*, 410 F.3d 895, 914-15 (6th Cir.) (Sutton, J., dissenting) (the number of excited utterances that are testimonial "may be something approaching a null set"), vacated and superseded on other grounds, ___ F.3d ___, 2005 WL 3315297 (6th Cir. Nov. 23, 2005).

Resolving these cases in that manner would comport with history, square with *Crawford*'s analysis and description of what it means for a statement to be "testimonial," and respect the States' development and implementation over the past two centuries of the excited utterance doctrine. With respect to history, because excited utterances were admissible at common law, see *White v. Illinois*, 502 U.S. 346, 356 n.8 (1992) (citing *Thompson v. Trevanion*, 90 Eng. Rep. 179 (K.B. 1694)), their admission is not prohibited by the Sixth Amendment. See *Mattox*, 156 U.S. at 243. The fact that cases decided in the decades after the Founding regularly admitted (what we now call) excited utterances, and that early nineteenth century treatises recognized excited utterances as an exception to the general rule against hearsay, indicates that such statements were not considered at the time to violate a defendant's constitutional

rights. And because the States have traditionally allowed excited utterances into evidence at criminal trials, subjecting such evidence to the rule set forth in *Crawford* would substantially disrupt long-settled practice.

The excited utterance doctrine has evolved since the Founding, but in a direction that confirms the conclusion that excited utterances are not governed by *Crawford*. At common law, statements now known as excited utterances were admissible as *res gestae*, on the ground that they were a natural continuation of some exciting event. In the modern era, excited utterances are understood to result from spontaneous reactions to stressful events, made without reflective thought or deliberation. A statement that qualifies as an excited utterance is necessarily and fundamentally incompatible with *Crawford*'s understanding of "testimony," which is "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" 541 U.S. at 51 (quoting 1 N. Webster, *An American Dictionary of the English Language* (1828)); see *Arnold*, 410 U.S. at 914 (Sutton, J., dissenting) ("It is very difficult to imagine a 'solemn' excited utterance or even a semi-solemn excited utterance.").

ARGUMENT

EXCITED UTTERANCES ARE NOT GOVERNED BY *CRAWFORD V. WASHINGTON*, 541 U.S. 36 (2004).

Excited utterances are not governed by *Crawford* for two separate reasons. First, because excited utterances were admissible as an exception to the hearsay rule at common law, the exception was incorporated into the Sixth Amendment; this means that excited utterances, as understood at common law, fall outside *Crawford*'s scope regardless of whether they are testimonial. Second, excited utterances, as understood in the modern era, are nontestimonial within the meaning of

Crawford, and thus fall outside of *Crawford*'s scope regardless of whether they would have been admissible at common law.

A. Excited Utterances Of The Kind Admissible At Common Law Are Not Governed By *Crawford*.

This Court looks to common law practice at the time of the Framing to ascertain the scope of the various provisions of the Bill of Rights. See, *e.g.*, *Atwater v. City of Lago Vista*, 532 U.S. 318, 326-344 (2001); *Apprendi v. New Jersey*, 530 U.S. 466, 478-481 (2000); *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 358-371 (1995) (Thomas, J., concurring). The notion is that the Bill of Rights, absent a clear textual indication to the contrary, should not be interpreted to prohibit common law practices accepted at the Framing. See *Atwater*, 532 U.S. at 345 n.14 ("courts must be 'reluctant . . . to conclude that the Fourth Amendment proscribes a practice that was accepted at the time of adoption of the Bill of Rights . . . .'") (quoting *Tennessee v. Garner*, 471 U.S. 1, 26 (1985) (O'Connor, J., dissenting)); *Mattox*, 156 U.S. at 243 ("Many of [the Constitution's] provisions in the nature of a bill of rights are subject to exceptions, recognized long before the adoption of the constitution, and not interfering at all with its spirit. Such exceptions were obviously intended to be respected."); see also *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897) (same).

Consistent with this interpretive principle, *Crawford* held that "the 'right . . . to be confronted with the witnesses against him,' Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." 541 U.S. at 54. It follows, the Court observed, that an exception to the Confrontation Clause's prohibition of testimonial hearsay might be drawn for hearsay admissible at the time of the Founding. *Id.* at 56 & n.6 (noting the existence of a hearsay exception for dying declarations at common law, and leaving unresolved

whether, given that exception, the Sixth Amendment "incorporates an exception for testimonial dying declarations"). In dicta, the Court suggested that the only such hearsay exception was for dying declarations. *Id.* at 56 n.6 ("If this exception [for dying declarations] must be accepted on historical grounds, it is *sui generis*.").

Two footnotes later, however, *Crawford* noted the possibility that the common law also recognized a hearsay exception for excited utterances. *Id.* at 58 n.8. (The Court used the term "spontaneous declarations," but that term is equivalent for present purposes to "excited utterances.") As demonstrated below, such an exception did exist at common law. For that reason, excited utterances of the type admissible at common law fall outside the prohibition set forth in *Crawford*, even assuming (incorrectly, see Section B, *infra*) that they are testimonial within the meaning of *Crawford*.

The excited utterance doctrine traces its provenance to *Thompson v. Trevanion*, Skin. 402, 90 Eng. Rep. 179 (K.B. 1694), where Lord Chief Justice Holt held "that what the wife said immediate[ly] upon the hurt received, and before that she had time to devise or contrive any thing for her advantage, might be given into evidence" as "evidence of wounding." See 3 John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law*, § 1746, at 2250 (1904) (hereniafter, "Wigmore (1904)") (citing *Thompson* as first case to recognize the doctrine); *Crawford*, 541 U.S. at 58 n.8; *White*, 502 U.S. at 356 n.8.

Although apparently not cited in any reported decisions before the Framing, *Thompson* appeared in cases and treatises shortly after the Founding. In *Aveson v. Kinnaird*, 6 East 188, 102 Eng. Rep. 1258 (1805), Lord Ellenborough, citing *Thompson* with approval, held that if a wife "declared at the time that she fled from immediate terror of personal violence from the husband," her out-of-court statement would be

admissible. *Id.* at 193-194, 102 Eng. Rep. at 1261; see also *Berkeley Peerage Case*, 4 Camp. 401, 408, 171 Eng. Rep. 128, 131 (1811) ("Hearsay evidence is always to be received with caution, and particularly that which may have arisen when men's minds were heated and biassed by an existing controversy upon the subject; but instead of laying down a rigid rule which may exclude *bona fide* declarations entitled to implicit credit, confide in the discretion of the Judge . . . .") (not citing *Thompson*).

Shortly thereafter, in "one of the most important evidence treatises of the nineteenth century," Richard D. Friedman and Bridget McCormack, *Dial-In Testimony*, 150 U. Pa. L. Rev. 1171, 1211 (2002), the author favorably cited both *Thompson* and *Aveson* as exceptions to the general rule against admitting hearsay. 1 S.M. Phillipps, *A Treatise on the Law of Evidence* 202-203 (1st Am. ed. 1816). The same treatise cited *Rex v. Brasier*, 1 East Pl. Cr. 444 (1779), for the proposition that "on an indictment for a rape, what the girl said recently after the fact, (so that is excluded a possibility of practising on her), has been held to be admissible in evidence, as part of the transaction." Phillipps, at 202. Less than a decade later, another treatise cited *Thompson* in explaining that

> where an immediate account is given, or complaint made, by an individual, of a personal injury committed against him, the fact of making the complaint immediately, and before it is likely that anything should have been contrived and devised for the private advantage of the party, is admissible in evidence; as upon an indictment for rape, or upon an action for trespass and assault committed on the wife.

1 Thomas Starkie, *A Practical Treatise on the Law of Evidence* 149 (1st ed. 1824) (also citing *Rex v. Clarke*, 2 Starkie 242 (1812), and *Brasier*). And while petitioner Davis cites Eustachius Strickland, *A Treatise on Evidence* 397 (1830), for

the proposition that "contemporaneous declarations 'respecting the motives or objects he had in view of doing' the act were admissible, but assertions 'made prior or subsequent to the doing the acts' were not," Davis Br. 24, the Strickland treatise, on the very same page, approvingly cites *Thompson* for the proposition that "what the wife had said immediately upon the hurt, and before she had time to devise or contrive anything for her own advantage, might be given in evidence."

In *Rex v. Foster*, 6 Car. & P. 325, 25 Eng. C.L.R. 421 (1834), where the defendant was tried for manslaughter for running over the victim with a cabriolet, a wagoner testified as to what the victim said shortly after the incident. The wagoner did not see the incident itself, but "immediately after, on hearing the deceased groan, he went up to him and asked him what was the matter." *Ibid.* At that point, defense counsel objected, asserting "that what the deceased said in the absence of the prisoner, as to what had caused the accident, is not receivable in evidence." *Ibid.* In rejecting that argument, Justice Park, relying upon *Aveson*, admitted the testimony "to show what it was that had knocked the deceased down." *Ibid.* It bears mention that the reporter of the *Foster* case, in an annotation providing the precise citation to *Aveson* (6 East, 193), noted that *Aveson* had in turn relied upon Lord Chief Justice Holt's decision in *Thompson*. 6 Car. & P. at 325.

In *Commonwealth v. M'Pike*, 57 Mass. (3 Cush.) 181 (1849), another manslaughter case, the victim died three months after being stabbed by the defendant, her husband. Upon being stabbed, the victim ran from her apartment up the stairs to her neighbor's, knocked on the door, and was let in. *Id.* at 182. A third person, who had heard the victim scream, "went for a watchman," and returned to the neighbor's room, where the victim asked him for water and said that the defendant had stabbed her. *Ibid.* The trial court overruled the defendant's objection to the third person's testimony, and the Supreme

Judicial Court affirmed, reasoning that "[t]he declaration of a person, who is wounded and bleeding, that the defendant has stabbed her, made immediately after the occurrence, though with such an interval of time, as to allow her to go from her own room up stairs into another room, is admissible in evidence." *Id.* at 181; accord, *Commonwealth v. Hackett*, 84 Mass. (2 Allen) 136, 138-140 (1861).

This Court relied upon several of the foregoing precedents in *Insurance Co. v. Mosley*, 75 U.S. (8 Wall.) 397 (1869). As evidence that the insured died from accidental causes, the insured's wife testified that the insured "got up [from bed] and went down stairs for the purpose of going out back," that "she didn't know how long he was gone," and that "[w]hen he came back he said he had fallen down the back stairs and almost killed himself." *Id.* at 399. In addition, the insured's son testified that "'he saw his father lying with his head on the counter, and asked him what was the matter; he replied that he had fallen down the back stairs and hurt himself very badly.'" *Id.* at 404.

The insurer argued that the declarant's statements should not have been admitted "as evidence of his fall down the stairs." *Id.* at 402-403. This Court disagreed, holding that the statements "were made immediately, or very soon after the fall; the declarations to his son, before he returned to his bed-room; those to his wife, upon his reaching there." *Id.* at 404. To support its ruling, this Court summarized the holdings of, and approvingly cited, *Thompson*, *Aveson*, *Foster*, and *M'Pike*. *Id.* at 405-407. In particular, the court explained that "[i]t is not easy to distinguish this case and that of [*Rex*] *v. Foster*, in principle, from the case before us, as regards the point under consideration." *Id.* at 407. In conclusion, and perhaps to eliminate any doubt as to the basis of its holding, the Court observed that the declarant's statements could not have been admitted as dying declarations. *Id.* at 409.

Despite the foregoing, petitioners assert that the common law did not recognize a hearsay exception for excited utterances. Hammon Br. 23 ("it is clear that as of 1791 there was no doctrine allowing admissibility of otherwise inadmissible statements on the ground that they were spontaneous declarations or excited utterances"); Davis Br. 18-22. To establish their point, petitioners must overcome *Thompson*, which was decided in 1694 and reported in 1728, see 6 W.S. Holdsworth, *A History of the English Law* 553 (1924), and thus available to the Framers. Their various attempts to do so are without merit.

1. Petitioners observe that *Thompson* was a civil case, not a criminal case. Hammon Br. 24; Davis Br. 29. That is true, but irrelevant. *Foster* and *M'Pike*, both criminal cases, relied upon *Thompson* (the former derivatively through *Aveson*), which indicates that courts understood *Thompson* to state a general evidentiary principle applicable to civil and criminal cases alike. The point is confirmed by Phillipps and Starkie, who in their early nineteenth century works cited *Thompson* in the same breath as criminal cases like *Brasier* and *Clarke*. See Phillipps, at 202-203; 1 Starkie, at 149. Further confirmation comes from this Court's opinion in *Mosley*, which cited civil (*Thompson* and *Aveson*) and criminal (*Foster* and *M'Pike*) cases for the same generally applicable evidentiary principle. *Crawford* itself cites *Thompson* as relevant authority. 541 U.S. at 58 n.8.

2. Hammon observes that *Thompson* was reported in 1728, but was not cited by another published decision until 1805. Hammon Br. 24. This, too, is true, but irrelevant. That *Thompson* was not cited by another *reported* decision until 1805 does not mean that the precedent was unknown or ignored in English and Colonial courts, the vast majority of whose decisions were unreported. *Thompson* itself was reported (Skin.

402), and it is sheer speculation for petitioner to suggest that it went unnoticed prior to the Founding.

3. Petitioners contend that *Thompson* was too vague and cryptic to stand for much of anything, let alone the principle that excited utterances are admissible as an exception to the hearsay rule. Hammon Br. 24-25; Davis Br. 30. Justice Clifford made a materially identical argument in his dissent in *Insurance Co. v. Mosley*, where he asserted that *Thompson* and *Foster* "are so imperfectly reported that they can hardly be said to be reliable." 75 (8 Wall.) at 418 (Clifford, J., dissenting). That argument failed to persuade this Court in *Mosley*, which had no trouble citing both decisions, and is no more persuasive 136 years later.

4. Petitioners contend that *Thompson* and its progeny govern only those circumstances where the out-of-court statement follows instantaneously from, or occurs simultaneously with, the exciting event. Hammon Br. 25-27; Davis Br. 30-31. Again, Justice Clifford unsuccessfully advanced the same argument in *Mosley*, see 75 U.S. (8 Wall.) at 412-413 (Clifford, J., dissenting). This Court rejected that proposition in citing *Thompson* to support the admission of an excited utterance made at least several minutes following the startling event. See *id.* at 399, 404; accord, *M'Pike*, 57 Mass. (3 Cush.) at 181-182 (same). *Thompson*'s and *M'Pike*'s application of the excited utterance doctrine in non-instantaneous circumstances is consistent with the views of Phillipps, who a generation after the Founding employed the term "recently," in addition to "immediate[ly]," in describing the appropriate interval between the exciting event and the (admissible) hearsay that followed. Phillipps, at 202-203.

5. Petitioners contend that two pre-Framing cases, *Rex v. Brasier*, 1 Leach 199, 168 Eng. Rep. 202, 1 East Pl. Cr. 443 (K.B. 1779), and *Rex v. Radbourne*, 1 Leach 457 (1787), established a rule contrary to that set forth in *Thompson*, and

thus cast doubt upon whether *Thompson* reflected the law prior to the Framing. Hammon Br. 27-28; Davis Br. 20, 28. They are incorrect.

The defendant in *Brasier* was charged with assault upon a five year-old girl. 1 East Pl. Cr. at 443. The victim's mother and another woman testified that the victim, "immediately upon her coming home[,] told all the circumstances of the injury done to her, and described the prisoner, who was a soldier, as the person who had committed it." *Ibid.* After the defendant was convicted, the trial judge referred the matter "for the opinion of the judges." *Ibid.* Two of the judges (Gould and Willes) initially believed that the testimony was properly admitted, given their view that children under the age of seven could not be sworn. *Id.* at 444. The matter then was submitted to all of the judges, who (contrary to Gould's and Willes's initial view) "unanimously agreed that a child of any age, if she were capable of distinguishing between good and evil, might be examined on oath; and consequently that evidence of what she had said ought not to have been received." *Ibid.* Significantly, the report concludes by noting that "[i]t does not however appear to have been denied by any in the above case, that the fact of the child's having complained of the injury recently after it was received is confirmatory evidence." *Ibid.*

Thus, at bottom, *Brasier* set forth a rule concerning whether a child is competent to testify at trial, not whether her out-of-court statement was inadmissible hearsay. That is precisely how the early state cases interpreted the decision. See *State v. Whittier*, 21 Me. 341, 1842 WL 1198, *5 (1842); *State v. Morea*, 2 Ala. 275, 1841 WL 201, *3 (1841); *State v. Miller*, 1 Del. Case 512 (1814); see also 1 John E. B. Myers, *Evidence in Child Abuse and Neglect Cases* § 2.2, at 67 (1992) (citing *Brasier* as the first case to create a presumption of competency for child witnesses); Comment, *Li'l People, Little Justice: The Effect of the Witness Competency Standard in California on*

Children in Sexual Abuse Cases, 22 J. Juv. L. 113, 114 (2001-2002) (citing *Brasier* as a competency case). Equally significant, Phillipps and Starkie — in marked contrast to petitioners — interpreted *Brasier* as reflecting, rather than refuting, the principle earlier set forth in *Thompson*. See Phillipps, at 202 (citing *Brasier* for the proposition that "on an indictment for a rape, what the girl said recently after the fact, (so that is excluded a possibility of practising on her), has been held to be admissible in evidence, as part of the transaction"); 1 Starkie, at 161 (citing *Brasier* for the proposition that "where an immediate account is given, or complaint made, by an individual, of a personal injury committed against him, the fact of making the complaint immediately, and before it is likely that anything should have been contrived and devised for the private advantage of the party, is admissible in evidence; as upon an indictment for rape"). If *Brasier* meant what petitioners claim it means, then Phillipps and Starkie, both writing in the early nineteenth century, would not have read it the way they did.

Even putting aside what *Brasier* meant, those who drafted the Confrontation Clause would not have been aware of, and so could not have been influenced by, the case. *Brasier* is cited in three reporters. Volume 168 of the English Reports was not published until 1928. Volume 1 of East's Pleas of the Crown was not published until 1803. The first volume of Thomas Leach's Crown Cases was not published until May 1789, in London, "at the earliest." Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in* Crawford v. Washington, 71 Brook. L. Rev. 105, 157 n.163 (2005).

Although May 1789 predated the Framing, Leach's volume was not published in time to have actually influenced the Framers. The First Congress approved the Bill of Rights for state ratification in September 1789. *Id.* at 159. However,

"[t]he legislative record shows that there was no alteration of the [Confrontation Clause's] text following the report of the committee of eleven on July 11, 1789, and the only change that committee made from the proposals Madison had offered on June 8 [was] the deletion of the redundant words 'accusers and' . . . ." *Ibid.* Given this, Leach's first volume likely did not reach our shores by the time the Clause was framed. *Id.* at 160 ("taking into account the time to ship (literally) that volume to America and distribute it to customers, it is questionable whether copies . . . were available to Americans at all when the Confrontation Clause was framed"); cf. *White*, 502 U.S. at 363 (Thomas, J., concurring) (in ascertaining the meaning of the Confrontation Clause, looking to what "the drafters of the Sixth Amendment intended").

Davis cites the other pre-Framing case, *Rex v. Radbourne*, as evidence that English courts at the time of the Framing refused to admit testimony of "accusations" made to police "fresh[ly]" after the crime. Davis Br. 20. But because *Radbourne*, like *Brasier*, was first published in Leach, it could not have come to the attention of the Framers before the Framing. In any event, *Radbourne* did not appear to involve an excited utterance and says nothing to suggest that one would have been inadmissible.

The victim in *Radbourne* was lying in her bed, her wounds already bandaged, when she made the inadmissible statements, and there is nothing in the transcript of proceedings to indicate that she was agitated when she spoke. The Proceedings of the Old Bailey, London 1674 to 1834, Henrietta Radbourne, t17870711-1, at 11-12 (July 11, 1787), <http://www.oldbaileyonline.org/html_units/1780s/t17870711-1.html> (last visited Jan. 12, 2006) (testimony that victim was in bed and that constable could not observe her wounds because they were "done up" before he arrived) (using citation convention described in Davis Br. 19 n.4). Moreover, because

the defendant was a servant accused of killing her mistress, she was charged with both murder and petty treason. *Id.* at 20. "Thus, evidence in the trial was subject to the explicit requirement in the treason statutes," not applicable under the Marian statutes, "that all evidence of treason be taken 'in the presence' of the accused." Davies, 71 Brook. L. Rev. at 165. Given this, it is no surprise that nineteenth century American cases that cited *Radbourne* did not do so for the proposition advanced here by Davis. See, *e.g.*, *Mattox*, 156 U.S. at 240 (for the proposition that "the testimony of a deceased witness cannot be used in a criminal prosecution"); *Hart v. State*, 15 Tex. App. 202, 1883 WL 8889, *15 (1883) (for the proposition that "[i]n England, testimony before the examining magistrate on a charge of felonious wounding was deemed admissible on the trial for murder, where the injured person had died of the wound").

Davis also cites *State v. Hill*, 20 S.C.L. 607, 1835 WL 1416, *2 (App. L. 1835), as establishing that "[d]eclarants' 'excitement' . . . in no way exempted their statements reporting crimes to governmental agents from confrontation restrictions." Davis Br. 22. "If anything," Davis contends, "such excitement was seen as heightening the need for cross-examination," quoting the court's reference to excitement's potential to "'color[]'" testimony. *Ibid.* In fact, the declaration in *Hill* took the form of a "deposition . . . made on the application for" an arrest warrant in formal proceedings before a magistrate. 1835 WL 1416, at *1. That is precisely the sort of "formal statement to government officers" governed by the Confrontation Clause. *Crawford*, 541 U.S. at 51. Moreover, the "excitement incident to the wrong done" to which *Hill* referred as a possible source of bias is not the agitation that accompanies an excited utterance. Rather, as context makes clear, the court referred to the emotion that the crime victim may feel long after the incident, expressing concern that the declarant's status as a victim may "color[]" his formal testimony before a magistrate. *Ibid.*

Davis further cites *Rex v. Wink*, 6 Car. & P. 397, 172 Eng. Rep. 1293 (1834), for the proposition that a constable could not be asked at trial to repeat a robbery victim's identification of the assailant when reporting the crime. Davis Br. 20. Davis buries *Wink* in a parenthetical, and for good reason. While holding that the constable could not *directly* testify as to the name told him by the victim, the court proceeded to rule that the constable could testify as to "whether, in consequence of the prosecutor mentioning a name to him, he went in search of any person and, if he did, who that person was," 6 Car. & P. at 398, 172 Eng. Rep. at 293 — which of course was functionally equivalent to allowing the constable to repeat the name the victim had given.

6. Finally, Davis relies on treatises and cases from after 1870 to support his view that excited utterances were inadmissible in criminal trials. Davis Br. 24-27. Even assuming that materials of that vintage are relevant here, the weight of case authority from that era took the view that excited utterances were admissible. See, *e.g.*, *People v. Del Vermo*, 192 N.Y. 470, 483-487, 85 N.E. 690, 695-696 (1908) (noting that exception was accepted in the majority of States); *State v. Morrison*, 64 Kan. 669, 68 P. 48, 51 (1902); *Croomes v. State*, 40 Tex. Crim. 672, 676-677, 51 S.W. 924, 925 (1899); *State v. Murphy*, 16 R.I. 528, 17 A. 998 (1889); *Dismukes v. State*, 83 Ala. 287, 3 So. 671, 673 (1888); *Irby v. State*, 25 Tex. App. 203, 213-214, 7 S.W. 705, 706 (1888); *People v. Callaghan*, 4 Utah 49, 6 P. 49, 54-55 (1886); *State v. Horan*, 32 Minn. 394, 20 N.W. 905 (1884); *Kirby v. Commonwealth*, 77 Va. 681, 1883 WL 6701, *5 (1883); *State v. Middleham*, 17 N.W. 446, 446 (Iowa 1883); *State v. Wagner*, 61 Me. 178, 1873 WL 3285, *10-*11 (1873); *Crookham v. State*, 5 W.Va. 510, 1871 WL 2786, at *3 (1871).

The weight of authority is even greater today. See *White*, 502 U.S. at 356 n.8 (excited utterance doctrine recognized under Fed. R. Evid. 803(2) and nearly four-fifths of the States).

This consensus, particularly given the long-standing vitality of the excited utterance exception and the "respect traditionally accorded the States in the establishment and implementation of their own criminal trial rules and procedures," *Chambers v. Mississippi*, 410 U.S. 284, 302-303 (1973), should not lightly be disturbed.

* * *

In sum, the hearsay exception for excited utterances, conceived in *Thompson*, existed at common law. Court decisions and treatises from the decades after the Framing, while of course unavailable to the Framers, provide persuasive evidence that the Framers' generation recognized the exception. See *Crawford*, 541 U.S. at 49-50 (citing cases through 1858 and treatises through 1872); cf. *Atwater*, 532 U.S. at 337-344; *Apprendi*, 530 U.S. at 501-512 (Thomas, J., concurring); *Utah v. Evans*, 536 U.S. 452, 503-506 (2002) (Thomas, J., concurring and dissenting); *Alden v. Maine*, 527 U.S. 706, 743-745 (1999); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 801-804, 816-819, 823-827 (1995). For this reason, the Confrontation Clause does not govern excited utterances of the type admissible at common law.

B. Excited Utterances, As Understood In The Modern Era, Are *Per Se* Nontestimonial And Thus Not Governed By *Crawford*.

In the early nineteenth century, the excited utterance doctrine was understood to be a subset of the *res gestae* doctrine. 2 McCormick on Evidence §268, at 195-196 (5th ed. 1999). The notion underlying *res gestae* was that certain types of hearsay statements were admissible because they were inextricably linked to action. "The *res gestae* doctrine focused not on the reflective faculties of the declarant, but on the strict contemporaneousness of the statement with the exciting event, so that the statement was essentially a continuation of the

event." Jone Tran, *Crying Wolf or an Excited Utterance? Allowing Reexcited Statements to Qualify Under the Excited Utterance Exception*, 52 Clev. St. L. Rev. 527, 541-42 (2004-05).

Shortly after the turn of the last century, Wigmore expressed a different understanding, explaining that "the basis for the spontaneous exclamation exception [was] not the contemporaneousness of the exclamation, but rather the nervous excitement produced by the exposure of the declarant to an exciting event." 2 McCormick, § 271, at 200. As Wigmore wrote: "The general principle is based on the experience that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock." 3 Wigmore (1904), §1747, at 2250. "The rationale for the exception lies in the special reliability that is furnished when excitement suspends the declarant's powers of reflection and fabrication." 2 McCormick, § 272, at 204.

Wigmore's recasting of the doctrine took hold and remains the prevailing rationale for the modern excited utterance doctrine. See Tran, 52 Clev. St. L. Rev. at 542 ("Wigmore's endorsement of deliberation over spontaneity ultimately superceded the *res gestae* doctrine as the lynchpin to the excited utterance exception."). Currently,

> all agree on two basic requirements. First, there must be an occurrence or event sufficiently startling to render inoperative the normal reflective thought processes of the observer. Second, the statement of the declarant must have been a spontaneous reaction to the occurrence or event and not the result of reflective thought. These two elements, which define the essence

> of the exception, together with a third requirement that the statement 'relate to' the event, . . . determine admissibility.

2 McCormick, §272, at 204. Although today's rationale for the doctrine differs from that prevailing at common law, the actual contours of the exception have changed little:

> Its phrasings differ widely in different courts; but there is in the judicial opinion of today something of an approach to uniformity. In essence, the language of Lord Holt, in *Thompson v. Trevanion*, still serves to indicate clearly and concisely the principle of the exception.

6 Wigmore, *Evidence* § 1747, at 196 (Chadbourn rev. 1976).

In their modern form, excited utterances are fundamentally incompatible with the conception of a "testimonial" declaration under *Crawford*. This emphatically is *not* because excited utterances are reliable or trustworthy. See *Crawford*, 541 U.S. at 60-65 (rejecting reliability and trustworthiness as the touchstone of Confrontation Clause analysis). Rather, it is because the agitated, unthinking state that makes an excited utterance reliable for hearsay purposes *also* makes it nontestimonial for Confrontation Clause purposes. Although *Crawford* "broke the linkage" between the Confrontation Clause and the "inquiry whether the testimony was eligible for admission under an accepted hearsay exception," the qualities that make a hearsay statement an excited utterance may still "bear on whether a statement is testimonial or not." *Arnold*, 410 F.3d at 912 (Sutton, J., dissenting).

The Confrontation Clause "applies to 'witnesses' against the accused — in other words, those who 'bear testimony.'" *Crawford*, 541 U.S. at 51 (citation omitted). A statement is testimonial if it is a "solemn declaration or affirmation made for

the purpose of establishing or proving some fact." *Ibid.* (internal quotations omitted). "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Ibid.* "The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement." *Ibid.*

The agitated declarant who makes an excited utterance is far afield from the formal accusers and solemn witnesses that concern the Confrontation Clause. Declarants in a state of "physical shock [or the] stress of nervous excitement," whose "reflective faculties" have been stilled, 3 Wigmore (1904) §1747, at 2250, are incapable of rendering solemn or formal statements. As Judge Sutton observed,

> It is very difficult to imagine a 'solemn' excited utterance or even a semi-solemn excited utterance. Any statement that takes on the qualities that the Court has ascribed to the definition of testimonial evidence (a 'solemn declaration . . . ' *Crawford*, 541 U.S. at 51) or to agreed-upon forms of testimonial evidence ('affidavits, depositions, prior testimony, or confessions,' *id.* at 51-52) would seem to depart from the prerequisites for establishing an excited utterance. To respect the one set of requirements would seem to disrespect the other.

Arnold, 410 F.3d at 914 (Sutton, J., dissenting); see also *id.* at 912 (Sutton, J., dissenting) ("Surely a victim's fear-induced statement to a 911 dispatcher that he is being chased through the house by an assailant is nothing more than a fervent cry for help, not a 'solemn declaration or affirmation made for the purpose of establishing or proving some fact' in a court of law.") (quoting *Crawford*, 541 U.S. at 51).

Both state supreme courts below examined the declarant's perspective in determining whether her statement was testimonial. Hammon J.A. 100-104; Davis J.A. 125-128. In challenging the courts' judgments, petitioners agree that analysis under *Crawford* should focus on the declarant's perspective. Hammon Br. 7, 14, 17-20; Davis Br. 13, 41-42; see also ACLU Br. 16 ("The testimonial nature of the statement should be tested by reference to how a reasonable person would expect the statement to be used."). For himself, Hammon contends that the inquiry should be whether the declarant "*knowingly created evidence* that a reasonable person understands will likely be used by the criminal justice system," and argues that "[t]he jurisprudence of the Confrontation Clause should recognize that such *self-conscious creation of evidence* is testimonial . . . ." Hammon Br. 18 (emphasis added).

Petitioners' approach is open to serious question for the reasons ably advanced by respondents Indiana and Washington. The point here is not to enter the debate, but merely to observe that petitioners' view, if adopted by this Court, would serve only to *strengthen* the proposition that excited utterances are *per se* nontestimonial. A declarant under the stress of nervous excitement, such that her normal reflective processes are rendered inoperative, is in no position to "self-conscious[ly]" do anything, let alone "creat[e] . . . evidence" that she "understands" will likely be used in a future prosecution. The reason is plain: "When the declarant's emotional state is such that it would satisfy the spontaneous utterance exception, the declarant does not (and reasonably would not) entertain any expectations about whether his or her statement will be used at a possible future trial — the whole premise of spontaneous utterances is that the witness is not capable of such reasoning at the time he or she is speaking." *Commonwealth v. Gonsalves*, 445 Mass. 1, 34, 833 N.E.2d 549, 572 (2005) (Sosman, J., concurring in part); accord, *State v. Ohlson*, 125 P.3d 990, 995 (Wash. App. 2005) ("It is not reasonable to regard an excited

utterance as 'bearing witness' such that the declarant would know that it would be used in a later prosecution.").

In sum, excited utterances, as understood under modern doctrine, are *per se* nontestimonial. For that reason — and regardless of whether (and, if so, to what extent) excited utterances were recognized as a hearsay exception prior to the Framing — they are exempt from scrutiny under *Crawford*. See 541 U.S. at 68 ("[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law").

CONCLUSION

The judgments of the Indiana Supreme Court and the Supreme Court of Washington should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

ADRIAN MARTELL DAVIS,

Petitioner,

v.

WASHINGTON,

Respondent.

HERSHEL HAMMON,

Petitioner,

v.

INDIANA,

Respondent.

ON WRITS OF CERTIORARI TO THE
SUPREME COURTS OF WASHINGTON AND INDIANA

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Br. Amicus Curiae of the ACLU and the ACLU of Va. in Support of Petr., *Lilly v. Virginia*, 527 U.S. 116 (1999) 3, 13

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Counsel for Children (NACC) is a non-profit child advocacy and professional organization founded in 1977. The NACC has approximately 2,000 members from all fifty states, including attorneys who represent children before family and juvenile courts, physicians, psychologists, social workers, law professors, and other professionals concerned with the protection of children. The NACC's mission is to improve the lives of children and families through legal advocacy. The NACC provides training and technical assistance to attorneys and other professionals, serves as a public information and professional referral center, and educates public officials about the needs of children.

Amicus submits this brief out of concern that Petitioners' proposed standard for defining "testimonial" statements under the Confrontation Clause is overbroad and unworkable and would further impede the States' ability to prosecute child abusers and protect the welfare of our children.[2]

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1. No counsel for a party authored this brief in whole or in part. No person or entity other than the NACC, its members and counsel made a monetary contribution to the preparation or submission of this brief. Both Petitioners and Respondents have consented to the filing of this brief, and pursuant to Rule 37.3(a), the NACC has filed the letters of consent with the Clerk of the Court.

2. Amicus curiae acknowledge the assistance of Thomas D. Lyon, J.D., Ph.D., Professor of Law, University of Southern California and Raymond LaMagna, University of Southern California Law School Class of 2006, in the preparation of this brief. Amicus also acknowledge the assistance of Jacob E. Smiles, an Arnold & Porter LLP associate who is admitted to practice only in Maryland and is practicing law in D.C. pending approval of his application for admission to the D.C. Bar and under the supervision of principals of the firm who are members in good standing of the D.C. Bar.

SUMMARY OF THE ARGUMENT

Child sexual abuse and other forms of child maltreatment are pervasive, yet most victims suffer in silence. Children's secrecy is maintained by their closeness to their perpetrators, by threats and inducements, and by violence in the home. Reporting is rare, and prosecution rarer still. Prosecutions are hobbled by child witnesses' vulnerabilities and by jurors' skepticism. States have responded by adopting statutes allowing children's out-of-court statements to be introduced at trial.

How this Court interprets its holding in *Crawford* in the present cases is likely to affect the continued viability of these statutes in prosecutions where an abused child is unable to testify. Although children's statements are not at issue here, Petitioners' proposed standard for defining "testimonial" statements should be considered in light of its implications for thousands of child maltreatment prosecutions.

Petitioners' standard—which asks whether a "reasonable person" would anticipate use of the statement for law enforcement purposes—is inherently flawed. Nowhere is this more evident than when the test is applied to cases of child sexual abuse.

First, a "reasonable person" standard is overbroad because it has the capacity to include as "testimonial" statements that declarants never anticipated would be used prosecutorially. For instance, a young child reporting sexual abuse may not appreciate that a statement could be used at trial, when a "reasonable person" would.

Some courts, attempting to preserve the objective nature of the test without embracing its inflexibility, have suggested that the reasonable person may be a "reasonable child." Others

have shifted to a subjective test when considering children's statements. Indeed, the leading scholarly proponents of Petitioners' standard have suggested that a subjective test for certain children declarants may be appropriate. *See* Richard D. Friedman, *Grappling With the Meaning of "Testimonial,"* 71 Brook. L. Rev. 241, 272-73 (2005); *see also* Richard D. Friedman, *The Conundrum of Children, Confrontation, and Hearsay*, 65 Law & Contemp. Probs. 243, 249-52 (2002).[3]

All variations of the test are unworkable. An inflexible objective test all but begs for exceptions for certain classes of declarants (*e.g.*, children, the mentally retarded). An age-based objective test would compel courts to make developmental assessments of children's understanding of "investigation," "prosecution," and "crime." A "reasonable child" test or subjective test would permit consideration of an actual or hypothetical child's abilities, experience, and contextual understanding. But these approaches would require courts to do exactly what Petitioner Hammon says they should not: "flail about in the dark in an attempt to understand the psyche of a speaker who is not even testifying in court." (Hammon Pet. Br. 18.)

Second, Petitioners' proposed test is overbroad because it could encompass statements made to non-governmental officials. (*Id.* at 17 ("[F]or a statement to be deemed testimonial, it is not essential that it be received by a government officer.")). Again, child abuse cases illustrate the complexities and flaws with such an approach.

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3. *See also* Brief Amicus Curiae of Law Professors Sherman J. Clark, James J. Duane, Richard D. Friedman, Norman Garland, Gary M. Maveal, Bridget McCormack, David A. Moran, Christopher B. Mueller, and Roger C. Park, in Support of Petitioner, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410), 2003 WL 21754958, at *22 n.12; Brief Amicus Curiae of the ACLU and the ACLU of Virginia, in Support of Petitioner, *Lilly v. Virginia*, 527 U.S. 116 (1999) (No. 98-5881), 1998 WL 901782, at *26 & n.44.

Children typically disclose abuse (if ever) to a trusted adult. Adult recipients of the information tend not to report, even in instances when they are legally mandated to do so. Nevertheless, Petitioners would have courts attempt to determine whether a "reasonable person" would expect the recipient to report abuse.

Such an approach is as historically unsound as it is unworkable. Child sexual abuse cases from the time of the Framing establish that children's out-of-court reports were routinely admitted into evidence, even if the child failed to testify at trial.

In sum, Petitioners' overbroad test would further silence child victims. Currently, less than 10% of all child sexual abuse comes to the attention of authorities, and still fewer are ever prosecuted. Additional obstacles that are not grounded in the text or history of the Confrontation Clause should be rejected.

ARGUMENT

I. MILLIONS OF CHILD VICTIMS ARE SILENCED BY ABUSE AND BY PROCEDURES DESIGNED TO PROTECT THEM.

A. Child Maltreatment Is Pervasive.

Child maltreatment[4] is pervasive and exploits the most vulnerable victims. Child sexual abuse, defined as sexual contact between an adult and a child, has been reported by 20% of women and 5 to 10% of men in the United States and other nations. Jennifer J. Freyd et al., *The Science of Child Sexual Abuse*, 308 Sci. 501 (2005). Based on the population of children in the United States, this means that more than 500,000 children fall victim to abuse every year. *See* Terry Lugaila & Julia Overturf, United States Census Bureau, *Children and the Households They Live In: 2000* (2004). These are conservative estimates, given the likelihood of underreporting and memory failure. Freyd, *supra*, at 501.

Child physical abuse is even more common than sexual abuse. David Finkelhor & Jennifer Dziuba-Leatheman, *Victimizaton of Children*, 49 Am. Psychologist 173, 175 (1994). Moreover, child maltreatment overlaps with domestic violence. Children are disproportionately present in homes to which police are called for domestic violence crimes.

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4. Child maltreatment includes physical child abuse, sexual child abuse, and child neglect. Child neglect includes a failure to provide for the child's needs or a failure to protect, and may include exposure to domestic violence. Douglas Barnett et al., *Defining Child Maltreatment: The Interface Between Policy and Research, in Advances in Applied Developmental Psychology: Child Abuse, Child Development and Social Policy*, at 7 (Dante Cicchetti & Sheree L. Toth eds.). This brief emphasizes child sexual abuse because it is among the most commonly prosecuted crimes against children.

John W. Fantuzzo, et al., *Domestic Violence and Children: Prevalence and Risk in Five Major U.S. Cities*, 36 J. Am. Acad. Child & Adolescent Psychiatry 116, 120 (1997). Approximately 40% of children in maritally violent homes are themselves physically abused. Anne E. Appel & George W. Holden, *The Co-Occurrence of Spouse and Physical Child Abuse: A Review and Appraisal*, 12 J. Fam. Psychol. 578, 583 (1998) (review of 31 studies). Beyond that, children exposed to domestic violence suffer from ill-effects akin to physically abused children. Katherine M. Kitzmann et al., *Child Witnesses to Domestic Violence: A Meta-Analytic Review*, 71 J. Consulting & Clinical Psychol. 339, 345-46 (2003) (meta-analysis of 118 studies).

B. Child Victims Are Silenced by Their Abusers and Few Cases Are Prosecuted.

Only about 10% of child sexual abuse is ever reported to the authorities (either police or social services). Freyd, *supra*, at 501. Indeed, most victims of child sexual abuse fail to disclose abuse to anyone until they reach adulthood. A nationally representative survey of 3,423 American men and women found that 78% of those disclosing sexual abuse to the surveyor failed to disclose abuse during their childhood. Edward O. Laumann et al., *The Social Organization of Sexuality: Sexual Practices in the United States* (1994). Delays of more than ten years have been reported by a majority of respondents in other nationally representative surveys. *See* Jessie Anderson et al., *Childhood Sexual Abuse Experiences in a Community Sample of Women*, 32 Am. Acad. Child & Adolescent Psychiatry 911, 915 (1993) (of 3000 New Zealand women surveyed, 52% failed to disclose abuse during childhood); *accord* Jillian M. Fleming, *Prevalence of Childhood Sexual Abuse in a Community Sample of Australian Women*, 166 Med. J. of Austl. 65, 67 (1997). And over a quarter of respondents in other national

surveys never told *anyone* they were abused until the survey, "not mothers, best friends, or husbands." Daniel W. Smith et al., *Delay in Disclosure of Childhood Rape: Results from a National Survey*, 24 Child Abuse & Neglect 273, 283 (2000).

One reason that children so frequently fail to disclose abuse is that most sexual abuse is perpetrated by adults who are close to the child. Most childhood rapes are by relatives, friends, and known acquaintances. In one nationally representative survey, only 10% of childhood rapes were by strangers. Smith, *supra*, at 278. Sexual abusers typically exploit a trusting relationship, either one that is born of family relationships and living arrangements, or one they create through their encounters with the child and his or her family. Michele Elliott et al., *Child Sexual Abuse Prevention: What Offenders Tell Us*, 19 Child Abuse & Neglect 579, 585 (1995).

It stands to reason that the closer the relationship between the child and the perpetrator, the greater the chance that abuse will not be disclosed, or that disclosure will be delayed. As the Court has recognized, "a child's feelings of vulnerability and guilt and his or her unwillingness to come forward are particularly acute when the abuser is a parent." *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987).

Children also fail to disclose because the abusers often threaten to harm them or their loved ones. In one nationwide survey of 954 criminal cases of childhood sexual abuse, children were threatened in over a fourth of the cases:

> [W]arnings ranged from pleas that the abuser would get into trouble if the child told (or that the abuser would be sent away and the child would never see them again—a powerful message to a

> young child whose abuser is also a "beloved" parent), to threats that the child would be blamed for the abuse (especially troubling were children who were told that the defendant's intimate—the child's mother—would blame the child for "having sex" with the defendant and would thus turn against him or her), to ominous warnings that the defendant would hurt or kill the child (or someone he or she loved) if they revealed the abuse.

Barbara Smith & Sharon G. Elstein, *The Prosecution of Child Sexual and Physical Abuse Cases: Final Report* 93, 122 (1993).[5]

When victims do come forward, their first disclosure is usually to a family member or friend, and virtually never to authorities. Moreover, most disclosures to private parties are never brought to the attention of authorities. Smith, *supra*, at 279 (6.6% of childhood rape victims first told police/social worker/clergy; only 12% *ever* reported to authorities). Abusers closer to the child are least likely to be pursued, given the child's and family's reluctance to proceed. Rochelle F. Hanson et al., *Factors Related to the Reporting of Childhood Rape*, 23 Child Abuse & Neglect 559, 560 (1999) (rapes by strangers more likely to be reported to authorities than rapes by perpetrators the child knew). Often, the child's

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5. A study examining over 500 cases of child sexual abuse prosecuted in Canada had similar findings, noting that threats were more common among children who delayed disclosure, threats were reported by about half of the children, and that "overt threats were not necessary if the man had a history of violence within the home." Louise D. Sas & Alison H. Cunningham, *Tipping the Balance to Tell the Secret: Public Discovery of Child Sexual Abuse* 1, 91-92, 122 (1995) (reporting threats to hurt the child or a third-party, harm the mother emotionally, withdraw privileges, and warnings that the abuser would be harmed by the disclosure or that the child would no longer be loved by his or her mother).

mother is herself the victim of domestic violence and unwilling to notify authorities. Appel & Holden, *supra*, at 582 (sexual abuse higher in homes with domestic violence).

As a result of non-disclosure, child sexual abuse is among the least prosecuted serious crimes. Further, even when the abuse is disclosed, various factors discourage prosecution. In large part because of the vulnerabilities of the victims—their age, their reluctance to testify, and the reluctance of their family members to pursue charges—most sexual abuse cases substantiated by social services are not prosecuted. Patricia G. Tjaden & Nancy Thoennes, *Predictors of Legal Intervention in Child Maltreatment Cases*, 16 Child Abuse & Neglect 807, 816-18 (1992) (19% of substantiated sexual abuse cases prosecuted). Even among cases presented for prosecution by the police, as many as half were rejected. *See* Theodore P. Cross et al., *Prosecution of Child Abuse: A Meta-Analysis of Rates of Criminal Justice Decisions*, 4 Trauma, Violence, & Abuse 323, 330 (2003).

C. Child Abuse Cases Are Notoriously Difficult To Prosecute.

As the Court has recognized, "[c]hild abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim." *Ritchie*, 480 U.S. at 60. This has long been the case. Matthew Hale, *The History of the Pleas of the Crown* 634 (T. Payne et al., 1778) ("The nature of the offense, which is most times secret, and no other testimony can be had of the very doing of the fact, but the party upon whom it is committed.").

Prosecutors face a number of hurdles when presenting child witnesses. Children who understand the importance of telling the truth may nevertheless fail to qualify to take the oath because of the way in which competency questions are

phrased. Thomas D. Lyon & Karen J. Saywitz, *Young Maltreated Children's Competency to Take the Oath*, 3 Applied Developmental Sci. 16, 1617 (1999); Thomas D. Lyon, et al., *Reducing Maltreated Children's Reluctance To Answer Hypothetical Oath-Taking Competency Questions*, 25 Law & Hum. Behav. 81, 8182 (2001). Children who testify truthfully are susceptible to error because of the intimidating nature of the courtroom or because of the aggressiveness of cross-examination. Karen J. Saywitz & Rebecca Nathanson, *Children's Testimony and their Perceptions of Stress In and Out of the Courtoom*, 17 Child Abuse & Neglect 613, 619-20 (1993) (children less accurate when questioned in courtroom environment); Rachel Zajac & Harlene Hayne, *I Don't Think That's What Really Happened: The Effect of Cross-Examination on the Accuracy of Children's Reports*, 9 J. Experimental Psychol. Applied 187, 193 (2003) (children less accurate when cross-examiner challenges their testimony). Protective devices designed to reduce children's trauma are also likely to reduce their credibility in the eyes of the jury, who expect to see live witnesses. *See, e.g.*, Gail S. Goodman, et al., *Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children's Eyewitness Testimony and Jurors' Decisions*, 22 Law & Hum. Behav. 165 (1998) (closed-circuit testimony increased children's accuracy but reduced jurors' perceptions of children's credibility).

Sexual abuse cases also present unique difficulties because of jurors' unrealistic expectations. Jurors expect medical evidence of sexual abuse, yet there usually is none. Susan Morison & Edith Greene, *Juror and Expert Knowledge of Child Sexual Abuse*, 16 Child Abuse & Neglect, 595, 607-08 (1992); Astrid Heger et al., *Children Referred For Possible Sexual Abuse: Medical Findings In 2384 Children*, 26 Child Abuse & Neglect 645, 652 (2002). Jurors expect children to exhibit strong emotional reactions when describing abuse,

yet children usually do not. Pamela C. Regan & Sheri J. Baker, *The Impact of Child Witness Demeanor on Perceived Credibility and Trial Outcome in Sexual Abuse Cases*, 13 J. Fam. Violence 187 (1998); Barbara Wood et al., *Semistructured Child Sexual Abuse Interviews: Interview And Child Characteristics Related to Credibility of Disclosure*, 20 Child Abuse & Neglect 81, 88 (1996). Moreover, jurors, particularly males, hesitate to convict if they believe that the child consented to the abuse, even if the "consenting" child is as young as eleven years old. Peter K. Isquith et al., *Blaming The Child: Attribution Of Responsibility To Victims Of Child Sexual Abuse, in Child Victims, Child Witnesses: Understanding & Improving Testimony* 203, 223 (G.S. Goodman & B. L. Bottoms eds., 1993).

Notwithstanding these hurdles, prosecutors still strive to produce a live witness in court, knowing that jurors likely will give hearsay evidence less credence. *See* John E.B. Myers et al., *Jurors' Perceptions of Hearsay In Child Sexual Abuse Cases*, 5 Psychol. Pub. Pol'y & L. 388 (1999) (hearsay evidence is generally used to supplement a child's testimony, not in its place). Nevertheless, prosecutors may be forced in some cases to rely upon the child's out-of-court statements where the child fails to qualify to take the oath, is too frightened to testify, or is kept away from trial.

II. CHILD MALTREATMENT CASES ILLUSTRATE THAT PETITIONERS' PROPOSED STANDARD FOR DEFINING "TESTIMONIAL" STATEMENTS IS INHERENTLY FLAWED.

Petitioners urge the Court to adopt a "simple" standard to define when a statement is "testimonial" for Confrontation Clause purposes: "whether a reasonable person in the position of the declarant would anticipate use of the statement in investigation or prosecution of a crime" (Hammon Pet. Br. 7), or whether "a reasonable declarant would have anticipated

that her statement might be used for law enforcement purposes." (Davis Pet. Br. 41.)[6]

As a threshold matter, Petitioners cite no historical support for the standard. Likewise, they provide no textual support. A defendant has a right to confront "witnesses," not "witnesses who reasonably would anticipate" that their statements may be used in the prosecution of a crime. Further, members of the Court have noted the practical difficulties with such a test:

> Attempts to draw a line between statements made in contemplation of legal proceedings and those not so made would entangle the courts in a multitude of difficulties. Few types of statements could be categorically characterized as within or without the reach of a defendant's confrontation rights.

White v. Illinois, 502 U.S. 346, 364 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in the judgment). Child maltreatment cases aptly illustrate these deficiencies.

A. Child Maltreatment Cases Illustrate That the "Reasonable Person" Standard Is Unworkable

The "reasonable person" test is overbroad because it will include as "testimonial" statements the declarant never anticipated would be used at trial.

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6. Though his position is not entirely clear, Hammon suggests that this test presumptively is met whenever a declarant makes a "statement . . . to a known police officer (or other government agent with significant law enforcement responsibilities) and accusing another person of a crime. . . ." (Hammon Pet. Br. 7.)

Even the leading proponents of the "reasonable person" test repeatedly have acknowledged that it may be ill-suited when the declarant is a young child abuse victim. *See* Friedman, *Grappling*, *supra*, at 272-73; *see also* Friedman, *Conundrum*, *supra*, at 249-52.[7] As Professor Friedman has explained:

> Suppose a child is so young that she has no sense that what she is reporting is wrongful conduct . . . and no sense that the person she identifies as the perpetrator is subject to punishment for it. Consider, for example, these two cases:
>
> 1. Webb: An eighteen-month-old girl, on being lowered into the bath, said, "Ow bum," and then after the bath, while her mother was examining her, "Ow bum daddy."
>
> 2. Rhea: A two-and-one-half year-old child was interviewed by a child protection specialist of the

7. *See also* Brief Amicus Curiae of Law Professors Sherman J. Clark, James J. Duane, Richard D. Friedman, Norman Garland, Gary M. Maveal, Bridget McCormack, David A. Moran, Christopher B. Mueller, and Roger C. Park, in Support of Petitioner, *Crawford v. Washington*, *supra*, 2003 WL 21754958, at *22 n.12 ("Amici candidly acknowledge that statements by young children will present some of the closest issues under the testimonial approach, just as they do in the current framework. Pre-trial statements by children to care-givers such as parents and physicians may be considered non-testimonial in some circumstances even though statements by adults in similar circumstances would likely be considered testimonial."); Brief Amicus Curiae of the ACLU and the ACLU of Virginia, in Support of Petitioner, *Lilly v. Virginia*, *supra*, at *26 & n.44 ("Statements made by children often pose difficult issues. . . . Professor Friedman would consider other factors with respect to children. For example, a very young child might have so little understanding that she should not be deemed a witness for Confrontation Clause purposes.").

> Department of Human Resources. In response to questions, she denied that her father had done anything wrong to her, but she nodded in agreement to the question, "Did daddy make you put his tee-tee in your mouth?"
>
> It seems dubious to say that the children in these cases were acting as witnesses.

Friedman, *Conundrum*, *supra*, at 250 (footnotes omitted).

Courts, ,too, have recognized the tendency of the "reasonable person" test to sweep in statements that the declarant might not anticipate being used at trial. *See Maryland v. Snowden*, 867 A.2d 314, 328-29 (Md. 2005) ("Although . . . there may be situations where a child may be so young or immature that he or she would be unable to understand the testimonial nature of his or her statements, we are unwilling to conclude that, as a matter of law, young children's statements cannot possess the same testimonial nature as those of other, more clearly competent declarants."). Yet, some courts have adopted the test nonetheless. *See id.* at 328; *Hawaii v. Grace*, 111 P.3d 28, 38 (Haw. 2005); *Rangel v. Texas*, __ S.W.3d __, No. 2-04-514-CR, 2006 WL 176839, at *5 & n.1 (Tex. App. Jan. 26, 2006).

Other courts have sought to remedy the shortcomings of a rigid reasonable person test by looking not to a "reasonable person," but rather, a reasonable person in the position of the declarant. Last week, for instance, the Colorado Supreme Court reinstated a conviction reversed by the intermediate appellate court, in part by finding that "an objectively reasonable person in the [seven-year-old] declarant's position would not have believed his statements to the doctor would be available for use at a later trial," where a police officer went with the child to the hospital and asked the doctor to

perform a forensic examination. *Colorado v. Vigil*, __ P.3d __, No. 04SC532, 2006 WL 156987, at *7 (Colo. Jan. 23, 2006).

Similarly, other courts address the over-inclusiveness of the test by turning the "reasonable person" standard into a subjective test which examines the perspective of the actual declarant. *See, e.g., Minnesota v. Scacchetti*, 690 N.W.2d 393, 396 (Minn. Ct. App. 2005) (statement to doctor non-testimonial because defendant failed to show that "the circumstances surrounding the contested statements led the 3-year-old to reasonably believe her disclosures would be available for use at a later trial, or that the circumstances would lead a reasonable child of her age to have that expectation."), *review granted* (Minn. Mar. 29, 2005). Indeed, the leading proponents of the test have suggested a variation of a subjective test in cases involving certain children may be appropriate. *See* Friedman, *Grappling*, *supra*, at 272-73.[8]

Though the "reasonable person in the position of declarant" or "subjective test" at least attempt to determine the understanding of a real or hypothetical declarant, these formulations would require courts to delve into the age and

8. It also has been suggested that certain children should potentially be relieved outright from the obligation of being "witnesses" for Confrontation Clause purposes. *See* Friedman, *Grappling*, *supra*, at 272; *accord* Sherman J. Clark, *An Accuser-Obligation Approach to the Confrontation Clause*, 81 NEB. L. REV. 1258 (2003). To be sure, child abuse cases present unique circumstances that may warrant such accommodations. *See generally Maryland v. Craig*, 497 U.S. 836, 849 (1990); *New York v. Ferber*, 458 U.S. 747, 757 (1982); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982); *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944). The reasonable person test, however, is not flawed only when the declarant is a child. Child abuse cases simply provide an apt illustration of the inherent problems of any test that requires an assessment of the mental state of a (real or hypothetical) declarant.

developmental stages of children concerning their potential understanding of the abuse and sophisticated concepts such as prosecution and punishment. *See* Chris Hutton, *Sir Walter Raleigh Revived: The Supreme Court Re-Vamps Two Decades of Confrontation Clause Precedent in* Crawford v. Washington, 50 S.D. L. Rev. 41, 57-61 (2005) (providing hypotheticals and differing outcomes based on age groups). For instance, children as young as two years old are capable of providing truthful information in response to nonleading questions about distressing events. Carole Peterson, *Children's Memory for Medical Emergencies: 2 Years Later*, 35 Developmental Psych. 1493 (1999). Moreover, toddlers may have some understanding that inflicting injury is immoral and leads to punishment. Judith G. Smetana & Judith L. Braeges, *The Development of Toddler's Moral and Conventional Judgments*, 36 Merrill-Palmer Quarterly 329 (1990). At the same time, children will appear not to understand the meaning and morality of the oath until they are five years or older. Lyon & Saywitz, *supra*. Still older children will lack understanding of court processes that might be integral to an awareness of the legal significance of one's statements. *See* Allie Phillips, *Child Forensic Interviews After* Crawford v. Washington: *Testimonial or Not?*, 39 Prosecutor 17, 21-27 (Aug. 2005) (discussing studies). Hence, one could conclude that children at a particular age are both capable and incapable of making "testimonial" statements, depending on how narrowly or broadly one defines "investigation," "prosecution," and "crime."[9]

9. Indeed, it is not even clear that the "reasonable" adult anticipates that accusatory statements made to the police may be used at trial. Research on adult domestic violence victims' calls to the police has found that many victims do not want the police to make an arrest, much less for the district attorney to pursue prosecution. *See, e.g.*, Robert Apsler et al., *Perceptions of the Police by Female Victims of Domestic Partner Violence*, 9 Violence Against Women 1318, 1326, Table 1 (2003) (only 1/3 of victims reporting abuse to police wanted arrest).

In sum, these judicial and scholarly struggles with the "reasonable person" test for children declarants reveal the inherent problem with *any* test that seeks to define "testimonial" based on a declarant's state of mind. An inflexible objective test all but begs for exceptions for certain classes of declarants (*e.g.*, children, the mentally retarded), while the subjective approaches would require courts to do exactly what Petitioner Hammon says they should not: "flail about in the dark in an attempt to understand the psyche of a speaker who is not even testifying in court." (Hammon Pet. Br. 18.) That the proposed test here is unworkable for many child abuse cases—one of the core areas of law impacted by *Crawford*—is telling. More telling is that a resemblance test, which puts the focus on the actions of the police, bypasses most, if not all, of these difficulties.

B. Petitioners' Test Is Overbroad Because It Could Potentially Define as "Testimonial" Reports of Abuse by Children to Family Members.

Petitioners' proposed test also is overbroad because it could encompass statements made to non-governmental officials. (Hammon Pet. Br. 17 ("[F]or a statement to be deemed testimonial, it is not essential that it be received by a government officer.")).

Again, child maltreatment cases illustrate the flaws with such an approach. Children typically disclose the abuse (if ever) to a trusted adult: a parent, a teacher, or a friend. Smith et al., *supra*, at 279. Petitioners would have courts attempt to determine whether a "reasonable person" making such disclosures would anticipate that the listener would report those statements to authorities for use in prosecution. Determining the mental state of a "reasonable person" in such circumstances would be unworkable. For instance, would a "reasonable person" assume that disclosure to an adult will

result in official intervention? If so, he would be wrong. Christopher Bagley & Richard Ramsay, *Sexual Abuse in Childhood: Psychosocial Outcomes and Implications for Social Work Practice*, 4 J. Soc. Work & Hum. Sexuality 33, 37 (1986) 37 (majority of disclosures to adults did not result in reports to authorities). Would a "reasonable person" be aware of applicable mandatory reporting laws, or how mandated reporters interpret and respond to those laws? *See* Nat'l Clearinghouse on Child Abuse and Neglect Information, *Mandatory Reporters of Child Abuse and Neglect* (2003) (documenting variability among states regarding who is mandated to report); Steven Delaronde et al., *Opinions Among Mandated Reporters Toward Child Maltreatment Reporting Policies*, 24 Child Abuse & Neglect 901 (2000) (finding variability among mandated reporters in their tendency to report).

Further, this broad approach is not rooted in the text of the Sixth Amendment. As one scholar explained:

> When Abner tells his best friend Betty—before the government has even appeared on the scene—that he saw Carl rob the liquor store, Abner is not a Confrontation Clause "witness" simply because Betty later takes the stand against Carl, and tells the jury what Abner told her. Within the meaning of hearsay doctrine and evidence law, Abner may indeed be an "out-of-court declarant" . . . . But this is not the proper test of the meaning of the word "witness[]" in the Constitution's Confrontation Clause. Within the meaning of both constitutional law—as evidenced by text, history, and structure—and common sense, Betty is the "witness," not Abner.

Akhil Reed Amar, *Confrontation Clause First Principles: A Reply to Professor Friedman*, 86 Geo. L.J. 1045, 1045-46 (1998) (footnote omitted).

C. Petitioners' Test Is Inconsistent with Admission of Children's Out-of-Court Statements Reporting Child Sexual Abuse in 18th Century Trials.

Beyond the textual deficiencies with Petitioners' proposed test, child sexual abuse cases decided around the time of the Framing refute any notion that all out-of-court statements by child victims are "testimonial." At that time, courts frequently admitted out-of-court disclosures of sexual abuse made by children to trusted adults, even when the child was unavailable for cross-examination.[10] Child rape trials in London's Old Bailey courthouse between 1744 and 1779 illustrate the point.[11] For example, in *R. v. Allam* (Old Bailey Proceedings Sept. 7, 1768), *available at* http://

10. A rule of best evidence was the central guiding principle for the admissibility of extrajudicial statements during the 1700s. *See* 1 Geoffrey Gilbert, *The Law of Evidence* 3-4 (Lintot 1756). A party was required to produce the best evidence that was in their possession or control. *Id.*; Francis Buller, *An Introduction to the Law Relative to Trials at Nisi Prius* 293 (I. Riley & Co. 1806); Thomas Peake, *A Compendium of the Law of Evidence* 8 (P. Byrne 1806). If a child was deemed incompetent to testify, her out-of-court statements could be heard utilizing a best evidence rationale: they constituted the best evidence available of her complaint.

11. Reports of these trials are available on a searchable database at www.oldbaileyonline.org. The database revealed no further proceedings in the cases discussed herein. It should be noted that

> To write legal history from the [Old Bailey Proceedings] is . . . a perilous undertaking which we would gladly avoid if superior sources availed us. However, on the present state of our knowledge about the best surviving sources, it has to be said that the [Old Bailey Proceedings] are probably the best accounts we shall ever have in what transpired in ordinary English criminal courts before the later eighteenth century.

John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. Chi. L. Rev. 261, 271 (1978).

www.oldbaileyonline.org/html_units/1760s/t17680907-40.html, the mother of the eight-year-old victim testified to the following: "the child then said, William Allam had had to do with her in the shed two days before. . . . [S]he said the first time was in the shed, when the peas were in blossom; I understood by the child he had had to do with her three times." The child did not testify in the proceedings, yet the mother was still permitted to testify as to what her daughter had told her regarding the rape. *See id.*

Similarly, in *R. v. Craige* (Old Bailey Proceedings July 3, 1771), *available at* http://www.oldbaileyonline.org/html_units/1770s/t17710703-33.html, the court permitted a neighbor to testify as to what he was told by the ten-year-old victim:

> [The child] burst out a crying, and said I will tell you who it was if you won't tell my dada; I said I would not, but would tell her mama. She said it was Mr. Craige. I asked her who he was; she said, the man that work'd for her father. I asked her how he met with her; she said she was playing with some peas, tossing them up upon the bed, as she sat in the room playing with her doll. As she went to get some of the peas, he throw'd her upon the bed, and did something that hurt her, and pressed her so hard upon her belly that she could eat no victuals all next day.

Id. The child never testified. *See id.*; *see also R. v. Ketteridge* (Old Bailey Proceedings Sept. 15, 1779), *available at* http://www.oldbaileyonline.org/html_units/1770s/t17790915-18.html (admitting the four-year-old child's out-of-court statement identifying the alleged abuser and the details of the rape); *R. v. Tibbel* (Old Bailey Proceedings Oct. 16, 1765), *available at* http://www.oldbaileyonline.org/html_units/

1760s/t17651016-2.html (allowing the child victim's mother to testify that her daughter told her that the injuries to her genitals were caused by the defendant); *R. v. Crosby* (Old Bailey Proceedings Dec. 7, 1757), *available at* http://www.oldbaileyonline.org/html_units/1760s/t17660903-38.html (mother testified that her daughter told her "Mr. Crosby did it, the day his wife went to the hospital, and left me there; he got into bed, and call'd me to him. I went to him. Then he pull'd me to him, and put his c - k to me there, and hurt me sadly" and the child victim did not testify); *R. v. Moulcer* (Old Bailey Proceedings Oct. 17, 1744), *available at* http://www.oldbaileyonline.org/html_units/1740s/t17441017-25.html (mother testified that her daughter, who did not testify, told her "Francis Moulcer had taken her into a shed, and laid her down on the top of some hides, and pulled down his breeches and lay with her").[12]

The Old Bailey Proceedings illustrate that, around the time of our Founding, parents and other adults frequently were permitted to testify regarding out-of-court statements by minors, even when those statements identified the alleged abuser and the alleged crime.

R. v. Brasier, 1 Leach 199, 168 E.R. 202 (1779), relied on by Petitioner Hammon, is not to the contrary. (*See*

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12. Although a number of these cases resulted in acquittal, this is consistent with acquittal rates for eighteenth-century rape cases in general. Low conviction rates may be explained by a requirement that the government prove penetration, *see, e.g.*, 1 Hale, *supra*, at 628, and in part from the overwhelmingly skeptical attitude with which rape accusations were viewed during the era. This highlights to some degree the significant societal and legal changes concerning child abuse that have taken place since 1791. *See* Myrna Raeder, *Remember the Ladies and the Children Too*, 71 Brook. L. Rev. 311, 311-12, 314 (2005) (questioning historic approach to Confrontation Clause given societal changes concerning domestic violence and child abuse).

Hammon Pet. Br. 27.) In *Brasier*, a five-year-old made a report of sexual assault to her mother, who testified to it at trial. *Brasier*, 168 Eng. Rep. at 202; 1 Edmond Hyde East, *A Treatise of the Pleas of the Crown* 443 (1806). The trial judge reserved the case for review, asking whether the child should have been allowed to testify unsworn. *Brasier*, 168 Eng. Rep. at 202 ("the judgment was respited, on a doubt, created by a marginal note" citing, *inter alia*, 1 Hale, *supra*, at 634; 2 Hale, *supra*, at 279).[13] The reviewing court considered and rejected Hale's proposal that a child could testify in court without taking the oath, holding "[t]hat no testimony whatever can be legally received except upon oath." *Brasier*, 168 Eng. Rep. at 202; *see also* 1 East, *supra*, at 443. The reviewing court added that the girl should not have been automatically presumed unavailable and incompetent to testify due to her age. *See Brasier*, 168 Eng. Rep. at 202-03; 1 East, *supra*, at 444. Rather, the trial court should have examined the girl to assess her ability to understand the oath. *See Brasier*, 168 Eng. Rep. at 202-03. Hence, her out-of-court statements were not the best evidence available, and the defendant was pardoned. The case simply does not address a situation in which a child is properly found incompetent to testify and her out-of-court statements are offered.

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13. Because young children were presumed incompetent, Hale proposed that courts hear children's unsworn testimony. 1 Hale, *supra*, at 634. Hale noted that parents were allowed to testify to their children's informal complaints; therefore, it made sense to hear directly from the children themselves: "Because if the child complains presently of the wrong done to her to the mother or other relations, their evidence upon oath shall be taken; yet it is but a narrative of what the child told them without oath, and there is much more reason for the court to hear the relation of the child herself." 1 Hale, *supra*, at 634-35. *See also* 1 East, *supra*, at 441 (stating same). Hale justified this procedure by citing the best evidence rationale for admission: "The nature of the offense, which is most times secret, and no other testimony can be had of the very doing of the fact, but the party upon whom it is committed." 1 Hale, *supra*, 634; *see also* 2 Hale, *supra*, at 279 (stating that the "exigence of the case requires" examining young children unsworn).

Petitioner Hammon, however, depends on *Brasier* for a very different and far more expansive proposition—that a victim's informal statements are "testimony" that can *only* be given in court under oath. (Hammon Pet. Br. 27.) This reading would render all hearsay inadmissible, and is clearly overly broad. Moreover, it misreads the court's use of the word "testimony," which appears twice in the opinion: "That no testimony whatsoever can be legally received except upon oath," 168 Eng. Rep. at 202, and "if [children] are found incompetent to take an oath their testimony cannot be received," *id.* at 203. This discussion is not about confrontation rights, but about the necessity of the oath and the procedure by which children are qualified to take the oath.

* * *

Petitioners' overbroad "reasonable person" test would further silence child victims and impede the States' ability to prosecute abusers. The test is contrary to *Crawford* and the history and text of the Sixth Amendment. It should be rejected in favor of a standard that treats as "testimonial" only those statements that were produced from the abusive practices the Confrontation Clause was designed to prevent.

CONCLUSION

For the foregoing reasons, the judgments in *Davis* (05-5224) and *Hammon* (05-5705) should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ADRIAN MARTELL DAVIS,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

On Writ of Certiorari to the Washington Supreme Court

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amicus curiae National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a membership of more than 10,000 attorneys nationwide, along with 78 state and local affiliate organizations numbering 28,000 members in 50 states.[1] *Amicus curiae* Washington Associa-

[1] Accompanying this brief are letters of consent to its filing. No counsel for any party authored any part of this brief, and no person or entity,

tion of Criminal Defense Lawyers (WACDL) is a not-for-profit corporation with a membership of nearly 700 attorneys practicing criminal defense law in Washington State. *Amicus curiae* Public Defender Service for the District of Columbia (PDS) represents indigent criminal defendants. WACDL participated in the state court litigation in this case. NACDL and PDS participated in this case at the certiorari stage, submitting briefs that urged this Court to grant review both in this case and in *Hammon v. Indiana*, Docket No. 05-5705.

Central to our role as criminal defense lawyers, *amici* assist "accused" persons in exercising their Sixth Amendment right to "be confronted with the witnesses against" them. U.S. Const. amend. VI. In many cases handled by *amici*, the right to confrontation still serves its traditional function of ensuring the adversarial mode of a criminal trial, where witnesses testify in open court, before the trier-of-fact, subject to cross-examination. But *amici* have too often been required to represent defendants in cases like Mr. Davis' and Mr. Hammon's—cases in which the government's proof consists of nothing more than the recitation of accusatory post-incident statements made by an absent witness to a police officer or a 911 operator. From a criminal defense perspective, such "witnessless" prosecutions[2] present grave dangers: They allow the accuser to level charges from somewhere other than the open courtroom, thereby escaping public scrutiny; defense counsel is never permitted to perform her most valuable function for her client—cross-examination of witnesses face-to-face in open court before the fact-finder; and the fact-finder is pre-

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other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

[2] Such prosecutions are also known as "victimless" or "evidence-based" prosecutions. But because there are, in fact, alleged victims in these cases (whether they appear at trial or not), and because all cases are "evidence-based," *amici* use the term "witnessless" in order to reflect the essence of these prosecutions, which is their lack of percipient witnesses at trial.

vented from serving as the real arbiter of the reliability of the accusations.

Because such "witnessless" prosecutions were generally forbidden in the United States for almost two hundred years under the commonly accepted understanding of the right to confrontation and because they gained some measure of approbation only in the wake of this Court's decision in *Ohio v. Roberts*, 448 U.S. 56 (1980), *amici* are the first generation of American defense lawyers to have experience representing their clients under such adverse conditions. Based on our knowledge of the inherent problems with these trials, *amici* urge this Court to continue down the path already charted in *Crawford v. Washington*, 541 U.S. 36 (2004), by reviving the common-law understanding of the Sixth Amendment where in-court confrontation of percipient witnesses is again the norm. *Amici* believe that the only way to accomplish this goal is to adopt a bright-line definition of "testimonial" statements protected by the Confrontation Clause that, at the very least, specifically requires confrontation at trial for all accusatory statements made to known government agents. *Amici* support Mr. Davis and Mr. Hammon in hopes that this Court will use their cases to adopt such a rule.

STATEMENT OF THE CASE

The only evidence the prosecution had to support the charge that Adrian Davis was responsible for Michelle McCottry's assault was the tape of Ms. McCottry's telephone interview with a 911 operator—a tape the prosecution told the jury constituted Ms. McCottry's "testimony." *State v. Davis*, 111 P.3d 844, 850 (Wash. 2005). *Amici* adopt Petitioner's statement of the case, with the additional observation that everything that is constitutionally impermissible about the lower court's approval of the "witnessless" prosecution in *Hammon* based on an unconfronted statement to a responding officer is similarly impermissible in this "witnessless" prosecution based on Ms. McCottry's unconfronted statements to a 911 operator.

SUMMARY OF ARGUMENT

In the brief *amici* have submitted simultaneously in support of Mr. Hammon, *amici* urge this Court to adopt a categorical rule that, at the very least, requires confrontation at trial for all accusatory statements made to known government agents. As *amici* explain, such a bright-line rule: (1) best reflects the original purpose of the Confrontation Clause, revived by *Crawford*, to promote and preserve the adversarial mode of criminal trial, (2) ensures confrontation for precisely those statements that the government will rely upon most heavily, and hence the statements that the defendant will most need to challenge and the statements that the fact-finder will find most material to its assessment of guilt, (3) establishes a clear rule that, in contrast to *Roberts* and many lower-court, post-*Crawford* analyses of "testimonial," is easily, efficiently and predictably applied, (4) negates any perverse incentives that encourage police to alter or abridge their investigative procedures to gather "unconfrontable" statements, and (5) is immune to the ever-present pressure from the government to shield its witnesses from the rigors of the adversarial system.

Such a bright-line rule must encompass accusatory statements made over the phone to 911 operators. 911 operators interview callers and record their statements with the object of providing this information to the police, and thus they functionally act as agents of the police. As Mr. Davis' case demonstrates, the statements that 911 operators obtain as a result of their interviews look like testimony, sound like testimony, are treated as testimony, and indeed are *called* testimony at trial. Thus, to exempt them from the process for the admission and consideration of testimony that the Constitution commands—presentation in person, in open court, before the defendant and the trier-of-fact, and subject to cross-examination—would only undermine our adversarial mode of criminal justice.

Indeed, the use of 911 tapes and transcripts in lieu of live testimony may present an even greater threat to our adversary system than the responding officer recitations in *Hammon* because the fact-finder hears the accuser's exact words (and if there is a tape, the accuser's actual voice) as if the accuser were there in court testifying for the prosecution, but the accuser is totally shielded from the rigors of confrontation. Moreover, any attempt to distinguish between 911 calls and responding officer statements—by allowing some sort of "emergency" exemption from the general adversarial model for 911 calls—cannot survive scrutiny and will inevitably encourage a race to the evidentiary bottom. The more hasty and incomplete a statement is the more likely it is to be presented to the fact-finder without confrontation. This cannot be what the Framers sought to achieve with the Confrontation Clause or what this Court sought to achieve with its decision in *Crawford*.

ARGUMENT

A CATEGORICAL DEFINITION OF "TESTIMONIAL" STATEMENTS THAT REQUIRES CONFRONTATION AT TRIAL FOR ALL ACCUSATORY STATEMENTS TO KNOWN GOVERNMENT AGENTS MUST INCLUDE ACCUSATORY STATEMENTS TO 911 OPERATORS.

Mr. Davis' case demonstrates why any fair definition of "testimonial" statements must include unconfronted accusations made to 911 operators. Any statement that brings the exact words of an accuser's narrative statement into the courtroom, as tapes and transcripts of 911 calls do—*i.e.*, any statement that looks like testimony, sounds like testimony, and functions as testimony at trial—should be subject to the process for the admission and consideration of testimony that the Constitution commands: presentation in person, in open court, before the defendant and the trier-of-fact, and subject to cross-examination.

Narrative statements to a 911 operator, like the statements made at the scene to a responding police officer at issue in *Hammon*, have all the components of "testimonial" statements. These sorts of accusatory statements set the machinery of the criminal justice system in motion toward the ultimate end of securing a conviction. In other words, by making an accusatory statement over the phone to a 911 operator, a caller-accuser is inviting a government response that predictably results in the accused's loss of liberty—whether or not the accuser is consciously aware of this fact, and whether or not this is the accuser's primary purpose.[3] Accusatory statements in 911 calls, like responding officer statements, are then passed on to the prosecution, and, as direct evidence of guilt, are generally used at trial as a critical element of prosecution's case. By the same token, these accusatory statements are the evidence that the defense most needs to probe and challenge in order to mount a defense, and are the very statements that the fact-finder weighs most heavily in deliberating to reach a verdict.

For these reasons, the use of unconfronted accusatory statements to 911 operators are just as much a threat to our adversarial system of criminal justice as accusatory statements to responding officers. In both instances, the defendant is not permitted to come "face to face" with the accuser, and defense counsel is unable to meaningfully challenge the accuser's memory, perception, bias, or veracity. And in both instances, the use of out-of-court accusations prevents the fact-finder from making a meaningful assessment of the reliability of the accusations, in accordance with its constitution-

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[3] Given public service campaigns encouraging citizens to "call 911" to report crimes, *see* Richard D. Friedman and Bridget McCormack, *Dial-In Testimony*, 150 U. Pa. L. Rev. 1171, 1194-95 (2002), there is every indication that the government intends to use this information for crime-fighting, which just illustrates how such accusations are "testimonial" in any meaningful sense of the term.

ally mandated role. In short, when either 911 calls or responding officer statements are admitted into evidence in the absence of the accuser coming into court and taking the stand, the trial does not look or function as the Framers intended.

Taped or transcribed 911 calls are potentially even more damaging to our adversarial system than out-of-court statements relayed by police officers, because the fact-finder hears the accuser's exact words as if the witness were there in court testifying for the prosecution, but the accuser is totally shielded from questioning by defense counsel. An accuser's own words in a 911 call, documented in a tape or transcript, are likely to have more force than the testimony of responding police officers relaying their summaries and imperfect recollections of undocumented oral accusations. Accusations made in a 911 call are even more shielded from adversarial testing. At least when an accuser makes an oral statement to a police officer, the prosecution must put the officer on the stand to relay the statement and this officer may be asked about his or her observations and perceptions of the accuser at the time the statement was made.[4] But when an accuser's statements to a 911 operator are taped or transcribed, all the prosecutor has to do is press play on the audio equipment or provide the fact-finder with a copy of the transcript.[5]

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[4] As *amici* note in *Hammon*, however, even the presence of this police officer at trial is of limited utility because the officer will be trained to record and repeat in court precisely what needs to be said to ensure the unconfronted statement's admission. *See Amici's* Merits Brief in support of *Hammon* at 15-16. Moreover, cross-examining a responding police officer who is merely relaying second-hand information will be of little help to the defense because the officer cannot know if the account of the incident is complete or accurate and does not have full, independent information about the relationship between the accuser and the defendant, or about other potential sources of the accuser's bias. *Id.* Likewise, putting a 911 operator on the stand would be equally unavailing.

[5] Although the tape or transcript must be authenticated, an authenticating witness will only be able to vouch that the tape or transcript is an

Defense counsel cannot question a tape recording or a transcript. Thus, with 911 calls, the fact-finder hears—in the accuser's own words—no more and no less than the government has trained its agents to elicit, but defense counsel is completely stymied. In this respect, accusations in 911 calls are functionally indistinguishable from witness statements made in transcribed grand jury proceedings or taped police interrogations—two types of statements this Court explicitly recognized as "testimonial" in *Crawford*. *See* 541 U.S. at 68.

Audiotaped 911 calls raise one additional concern because the fact-finder hears the accuser's actual voice. In effect, a recording of a 911 call is the closest that the prosecution can get to live testimony without actually putting the accuser on the stand. *See* Erin Leigh Claypoole, *Evidence-Based Prosecution: Prosecuting Domestic Violence Cases Without the Victim*, 39 Prosecutor 18, 21 (Feb. 2005) (Identifying the 911 tape as "[o]ne of the most helpful pieces of evidence in an evidence-based prosecution," because the fact-finder gets to hear the accuser's voice directly). This confusing resemblance to live testimony is likely why the trial prosecutor in Mr. Davis' case told the jury that Ms. McCottry had "left you her testimony," in the form of her recorded 911 call, "on the day that this happened." *See* Petitioner's Cert. Petition at 5. From the government's perspective, Ms. McCottry's 911 call so much resembled the evidentiary presentation the government would have made had Ms. McCottry appeared in court and answered questions on direct examination, it *was* the equivalent of testimony.

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actual tape or transcript of a call received by 911; he or she will have no ability to address the contents of the call. Indeed, the defense here deemed cross-examination of an authenticating witness to be of such little value that it stipulated to the admission of the 911 tape, while continuing to protest Mr. Davis' inability to confront his actual accuser, Ms. McCottry.

Just imagine if, at Sir Walter Raleigh's trial, the prosecution had had the technological capacity to play a tape of phone call of Lord Cobham leveling his accusations. Even if this call had been made seconds after Cobham claimed to have learned of Raleigh's allegedly treasonous conduct, this recorded statement would not have been any more reliable, or any more amenable to probing by Raleigh, but it almost certainly would have been more (unfairly) compelling to the fact-finder. Had the Framers had access to 911 technology, they surely would have recognized that such statements triggered the right to confrontation. *See Crawford*, 541 U.S. at 52 n.3 (where there is no "direct evidence" of the Framers' reaction to modern-day limitations on confrontation, courts should employ a "reasonable inference" analysis to preserve confrontation rights).

The counterargument that a statement made in a 911 interview, by its very nature, raises less need for confrontation than statements to responding officers because a 911 call is typically a "call for help" or a response to "immediate danger" cannot survive scrutiny. *But see Davis*, 111 P.3d at 849, 851 (Petitioner's Cert. App. 5, 7). First, this characterization wrongly assumes that the caller-accuser has a single motive—to seek aid[6]—when the caller-accuser may, in fact, have multiple motives, including the motive to initiate criminal proceedings. Second, this characterization simply assumes that everything that the caller says is true—*e.g.*, the caller needs assistance *because* the defendant has in fact hurt her—and "is merely a reliability analysis in disguise." *See People v. Walker*, 697 N.W.2d 159, 170 (Mich. App.) (Cooper, J. dissenting), *appeal granted*, 697 N.W.2d 527 (Mich. 2005). As such, it is just as inconsistent and manipulable as the

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[6] Such an assumption is on shaky ground in this case where Ms. McCottry "never ask[ed] for help," *Davis*, 111 P.3d at 854 (Sanders, J. dissenting), and when asked if she needed an "aid car," told the 911 operator, "no, I'm alright." Petitioner's Cert. Petition at 3.

judicial reliability tests under *Ohio v. Roberts*. With the caller-accuser absent from the courtroom, there is no way for judges to confirm the status of a statement as a "cry for help." *See Crawford*, 541 U.S. at 66 ("only cross-examination could reveal" a witness' "perception of her situation"). Thus, judges are left to their own, subjective devices to identify these statements. In short, their only means of distinguishing a "cry for help" from a mistaken or false accusation is that they know a "cry for help" when they see it.

No case demonstrates lower courts' overwillingness to affix the "cry for help" label to 911 calls better than *People v. Moscat*, 777 N.Y.S.2d 875 (N.Y. Sup. Ct. 2004), which has the dubious distinction of being the "most frequently cited decision" post-*Crawford* on the admissibility of unconfronted statements made in 911 interviews. *See* Tom Lininger, *Prosecuting Batterers After* Crawford, 91 Va. L. Rev. 747, 773 n. 136 (2005). In *Moscat*, the court held that 911 calls are generally made close in time to the alleged crime, and are motivated not by a desire to bring criminal charges against the defendant but a "desire . . . to be rescued from immediate peril." 777 N.Y.S.2d at 879. Accordingly, the court held that the "electronically augmented equivalent of a loud cry for help" purportedly made by the complainant to a 911 operator did not trigger the right to confrontation. *Id.* at 880. Later investigation revealed, however, that this influential decision had no factual foundation. In fact, "[t]he person who called 911 was actually a neighbor, not the victim" and "the call was made nine hours after the assault." Lininger, 91 Va. L. Rev. at 774 n.136. The prosecution eventually abandoned the case, *id.*, but *Moscat* is still on the books and is still cited as persuasive precedent. *See, e.g., Hammon v. State*, 829 N.E.2d 444, 454 (Ind. 2005); *State v. Forrest*, 596 S.E.2d 22, 26 (N.C. App. 2004), *aff'd*, 611 S.E.2d 833 (N.C. 2005).

As a practical matter too, the need for in-court adversarial testing of 911 calls is just as great if not more so than the

need for in-court adversarial testing of statements made to police officers responding to the report of a crime. Many of these statements are made in a hurried fashion when the speaker is under stress—factors that have a demonstrated tendency to cause errors in witness perception. *See* Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 Law & Hum. Behav. 687 (2004); Charles A. Morgan, III, et. al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 Int'l J. L. & Psychiatry 265 (2004). Also, 911 conversations are generally shorter, less comprehensive, and less accurate than even statements made in a "preliminary" interview (the boundaries of which are undefined and may be quite expansive[7]) with a responding police officer. And, because the speaker does not come "face to face" with the 911 operator, there is a greater level of anonymity with 911 calls—an aspect which the Framers certainly recognized as inimical to reliable statements. *See Lee v. Illinois*, 476 U.S. 530, 540 (1986) (Clause promotes "society's interest in having the accused and accuser engage in an open and even contest in a public trial . . . by ensuring that convictions will not be based on the charges of unseen and unknown—and hence unchallengeable—individuals"); *California v. Green*, 399 U.S. 149, 179 (1970) (Clause was intended to "constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses"); *Mattox v. United States*, 156 U.S. 237, 242 (1895) (Framers

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[7] For example, in the District of Columbia, the "preliminary" investigation of a domestic violence situation includes: victim and suspect interviews; witness interviews; obtaining names, addresses and phone numbers of witnesses; taking photographs of any injuries; seizing any evidence; determining if there is a temporary or civil protective order outstanding and obtaining copies thereof; and recovering any telephone answering machine recordings of any threats received by the victim or witnesses. *See* Metropolitan Police Department, District of Columbia, *General Order 304.11 for Intrafamily Offenses* (Jan. 1998).

rejected inquisitorial model because it did not allow face-to-face confrontation and cross-examination of one's accusers).

In fact, statements made on the telephone to 911 operators have proven particularly susceptible to error and even abuse. *See, e.g., United States v. Wilmore*, 381 F.3d 868, 869 (9th Cir. 2004) (911 caller falsely accused husband of robbing abortion clinic because she feared he would sell a Christmas gift for their children to get money for drugs); *United States v. Washington*, 263 F. Supp. 2d 413, 420 (D. Conn. 2003) (failure to disclose to defense that 911 caller had prior conviction for making a false report and was known to be a "persistent" liar); *State v. Brown*, 903 P.2d 459, 757-59 (Wash. 1995) (911 call erroneously admitted as excited utterance, given caller's testimony that she had decided to fabricate portion of her story before making telephone call); *Smith v. United States*, 666 A.2d 1216, 1224-25 (D.C. 1995) (failure to disclose to defense that key eyewitness had admitted that claim to 911 operator that robber had stuck a gun in his face—which was admitted as excited utterance—was false); *People v. Simpson*, 656 N.Y.S.2d 765, 767 (N.Y. App. 1997) (911 caller lied in order to get the police to respond more quickly to her home); *Keller v. State*, 431 S.E.2d 411, 411-12 (Ga. App. 1993) (false report of robbery both in 911 call and to responding police officers); *see also* Friedman & McCormack, 150 U. Pa. L. Rev. at 1197 (describing phenomenon in domestic violence cases of "the race to the phone by abusers who have been through the system and who know that they will be in a much better position if they are the first to call" the police for assistance).

Finally, if this Court creates an exception for 911 calls as "cries for help," police and prosecutors will inevitably alter their practices and 911 calls will become an even greater engine for "witnessless" criminal prosecutions. Prosecutors and police have already made efforts to adjust investigative practices post-*Crawford* so as to shoehorn accusatory state-

ments to known government agents into a perceived confrontation exception for "excited utterances" made in "preliminary" investigations. *See Amici's* Merits Brief in support of *Hammon* at 17-21. Thus, if the rationale of *Davis* is allowed to stand, it is hardly farfetched to imagine the adoption of a new police policy of calling into every house before entering, with the stated object of determining if anyone needs aid, in order to interview witnesses telephonically before interviewing them face to face. Likewise, if this Court were to endorse the "preliminary" aspect of an investigation as the touchstone of the "testimonial" inquiry, one would expect the government to expand the scripts of questions to callers developed under *Ohio v. Roberts*, *see, e.g.*, Petitioner's Cert. App. 21-23, so that 911 operators obtain the maximum amount of information from the caller-accuser while skirting the "testimonial" boundary. Alternatively, if this Court were to deem the breadth of questioning determinative, one would expect a push for 911 operators to abridge their script of questions in order to avoid disturbing the "call for help" label. Any of these responses would elevate the goal of production of "unconfrontable" evidence for trial over the proper investigation of crime and the promotion of public safety. *See* Lininger 91 Va. L. Rev. at 776 ("the Hobson's choice between presenting evidence and responding to emergencies must be avoided").

In sum, the admission of unconfronted accusatory statements to a 911 operator, like the admission of unconfronted accusatory statements to a responding police officer, subverts the bedrock confrontation guarantee that witness testimony be presented live, in court, before the trier-of-fact, and subject to cross-examination. Accordingly, a bright-line rule that accusatory statements to known government agents are testimonial statements that trigger the right to confrontation should extend to both statements alike.

CONCLUSION

For the reasons set forth above and in *Amici's* Merits Brief in support of Mr. Hammon, this Court should declare that all accusatory statements to known law enforcement officials—including statements made to 911 operators—are testimonial and, applying this categorical rule, should reverse Mr. Davis' conviction.

Respectfully submitted,

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Nos. 05-5224 and 05-5705

IN THE

Supreme Court of the United States

HERSHEL HAMMON,

Petitioner,

- v. -

INDIANA,

Respondent.

ADRIAN MARTELL DAVIS,

Petitioner,

- v. -

WASHINGTON,

Respondent.

ON WRITS OF CERTIORARI TO THE SUPREME COURTS OF INDIANA AND WASHINGTON

BRIEF OF *AMICUS CURIAE* THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF RESPONDENTS

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On Writs of Certiorari to the Supreme Courts of Indiana and Washington

BRIEF OF *AMICUS CURIAE* NATIONAL DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*

The National District Attorneys Association ("NDAA")[1] is a nonprofit corporation and the sole national

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[1] Accompanying this brief are letters of consent to its filing. No counsel for any party authored any part of this brief, and no person or entity, other than amicus, has made a monetary contribution to the preparation or submission of this brief.

membership organization representing local prosecuting attorneys in the United States. Since its founding in 1950, NDAA's programs of education and training, publications, and *amicus curiae* activity have carried out its guiding purpose of serving as "the Voice of America's Prosecutors and To Support Their Efforts to Protect the Rights and Safety of the People."

The NDAA and its members have a compelling interest in the outcome of these appeals because of the severe damage a reversal in either case could do daily in innumerable prosecutions in courthouses across this nation. Put simply, the positions advanced by petitioners would have an enormous and negative impact on the ability of prosecutors to do their jobs, and of the courts to do justice. As the facts in Hammon and Davis show, great harm would be done in domestic violence prosecutions, in which victims frequently will not appear in court. Should informal statements taken in the immediate wake of attacks on domestic violence victims be excluded, as petitioners ask, juries would never hear the reports which, very often, are the most trustworthy proof of serious crimes.

And the damage would by no means be limited to domestic violence cases. Elderly victims, children, and the socially powerless frequently are unable or unwilling to appear in court. A rule disallowing statements that traditionally have been admissible under hearsay exceptions such as the one for excited utterances would offer a free pass to many of those who prey on such victims. Nor are cases involving vulnerable victims the only ones at stake. For centuries the courts have admitted hearsay in all kinds of criminal cases, on behalf of the prosecution and the defense, because the wisdom of the

common law has demonstrated that hearsay exceptions promote just results.

Critically, there is no constitutional justification for the harmful results that petitioners seek. The Confrontation Clause was designed to preclude "trial by affidavit." A trial by affidavit is one in which the prosecution makes its case with a declaration (1) created in a formal out-of-court examination, by a government agent, (2) of a declarant aware that the statement was intended for use at a trial. NDAA asks this Court to return to this understanding of the Confrontation Clause and make clear that, subject to due process limitations, states are free to regulate the admissibility of non-testimonial hearsay statements.

SUMMARY OF ARGUMENT

The present cases require this Court to determine whether the statements at issue are "testimonial" hearsay barred by the Confrontation Clause of the Sixth Amendment. The petitioners in Hammon v. Indiana and Davis v. Washington both take a wrong turn in analyzing the meaning of "testimonial." In that regard, petitioner Davis incorrectly posits that the Confrontation Clause forbids the admission of any hearsay that does not fall within a hearsay exception recognized before 1791 (see Davis Brief: 11-12, 22-34).[2] This Court has never -- including in Crawford v. Washington – suggested that the Confrontation Clause froze hearsay law in 1791.

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[2] The brief of petitioner Hammon sometimes appears to endorse that position as well (see Hammon Brief: 22, 28).

Petitioner Hammon puts forward an equally flawed theory, finding "testimonial" any statement that transmits to a known public official "information for use in investigation or prosecution of crime" (Hammon Brief: 13). In Hammon's view, it makes no difference whether the officer or the declarant intended that the information would be used at a trial; nor does it matter why the information was transmitted or whether the officer was involved in preparing a case for trial (see Hammon Brief: 7, 10, 12-14, 18, 20-21, 41). In fact, Hammon would extend the meaning of "testimonial" to include many statements made to civilians (see id. at 11, 15 n 11, 17). This expansive view of the Confrontation Clause ignores the Framers' view: the clause was designed to serve the limited purpose of protecting against the common-law evil of "trial by affidavit."

As a review of this Court's decisions makes plain, the Confrontation Clause bars prosecutors from collecting formalized statements from witnesses and then using those statements at trial, without affording the defendant an opportunity for cross-examination. Beyond that core purpose, the Founders left the states free to develop hearsay exceptions, just as they are free to develop other aspects of evidentiary law and criminal procedure, in a manner consistent with due process. Otherwise, the Confrontation Clause will become a meta-hearsay rule imposed, unjustifiably, upon the states by the federal courts.

The argument of amicus NDAA consists of three parts. Part One examines the historical pronouncements of this Court to demonstrate that the Framers intended that the Confrontation Clause serve a limited purpose and did not seek to freeze hearsay law in 1791. Part Two discusses this Court's recent decision in Crawford v. Washington, 541

U.S. 36 (2004), which focused its analysis on the core purpose of the clause and rejected the view that virtually all hearsay is subject to Sixth Amendment scrutiny. Specifically, as Crawford explained, the Confrontation Clause imposes close constitutional scrutiny only on "testimonial" hearsay – that is, formal statements of witnesses created for use at trial, or their close equivalents. Part Three addresses the regulations, apart from the Confrontation Clause, which govern non-testimonial hearsay.

ARGUMENT

Part One: Supreme Court Pronouncements Regarding the Core Confrontation Right and its Relationship to the Hearsay Rule

A. The Text of the Confrontation Clause

The Sixth Amendment provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him" (emphasis added). It is undisputed that this clause permits a criminal defendant to confront and cross-examine any witness who gives live testimony at trial. However, from the text alone, it is not clear whether the clause bars the prosecution from introducing hearsay statements of declarants who do not appear at trial. As this Court noted in Crawford, "witnesses against" could be understood to mean only "those who actually testify at trial." Crawford, 541 U.S. at 42-43. If that definition were adopted, a hearsay declarant would not qualify as a "witness" within the meaning of the Confrontation Clause, just as a hearsay declarant is not ordinarily considered a "witness" within the

meaning of the compulsory process clause of the Sixth Amendment or the self-incrimination clause of the Fifth Amendment. See Amar, Confrontation Clause First Principles: A Reply to Professor Friedman, 86 Geo. L.J. 1045, 1047 (1998). Alternatively, "witnesses against" could be interpreted to mean "those whose statements are offered at trial," which would encompass all hearsay declarants. See Crawford, 541 U.S. at 43. Or, perhaps, the solution is "something in-between." Id.

B. Supreme Court Interpretations of the Confrontation Clause Prior To Ohio v. Roberts

The Confrontation Clause was not held applicable to the states until 1965. See Pointer v. Texas, 380 U.S. 400 (1965). In this Court's earlier decisions, few controversies arose regarding the Sixth Amendment right of confrontation, and the clause had little impact on the conduct of criminal trials. In fact, this Court did not consider whether the Confrontation Clause might bar admission of out-of-court statements at criminal trials until Reynolds v. United States, 98 U.S. 145 (1878), which was decided nearly 90 years after the adoption of the Bill of Rights.[3] And, when faced with that question, this Court adopted a circumscribed view that the confrontation right was grounded in its history and was a response to grave abuses that occurred at common law.

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[3] In Reynolds, this Court upheld the admission of an unavailable witness's prior testimony, because the defendant had an opportunity to cross-examine the witness at the prior trial and, also, the defendant was responsible for the witness's failure to appear. See id. at 159-61.

In particular, this Court's earliest decisions reveal that the "primary object" of the provision was "to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness." Mattox v. United States, 156 U.S. 237, 242 (1895); see also Snyder v. Massachusetts, 291 U.S. 97, 107 (1934); Dowdell v. United States, 221 U.S. 325, 330 (1911). Consistent with that purpose, many of the early Confrontation Clause disputes involved efforts by the prosecution to introduce formalized documents or the prior sworn statements of nontestifying witnesses. See, e.g., Dowdell, 221 U.S. at 328-30 (certified record of prior court proceedings); Motes v. United States, 178 U.S. 458, 470-74 (1900) (testimony at a "preliminary trial"); Kirby v. United States, 174 U.S. 47, 49-50, 53-54 (1899) (guilty pleas of accomplices); Mattox, 156 U.S. at 240-43 (prior sworn testimony of deceased witness); Reynolds v. United States, 98 U.S. 145, 158-61 (1878) (testimony at prior trial).[4]

To be sure, this Court realized that the confrontation right might sometimes overlap with common law hearsay prohibitions. For instance, in Mattox, the Court discussed in dicta whether the Confrontation Clause barred admission

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[4] The admission of formalized statements does not necessarily constitute a violation of the Confrontation Clause if the defendant had a prior opportunity to confront and cross-examine the witness. See Mattox, 156 U.S. at 240-43 (no error in admission of former testimony of deceased witness, whom the defendant had cross-examined at a prior trial: "the right of cross-examination having once been exercised, it was no hardship upon the defendant to allow the testimony of the deceased witness to be read").

of dying declarations, concluding that such statements were admissible under a longstanding common-law exception. See Mattox, 156 U.S. at 243-44; see also Dowdell, 221 U.S. at 330.[5] But critically, not one of this Court's early cases held that the Confrontation Clause barred the admission of statements that lacked the formal trappings of affidavits, depositions, prior sworn testimony, or the like.

Further, in its early decisions, this Court refused to expand the confrontation right beyond its core if doing so would interfere with state court procedures and evidentiary rules. For instance, in Snyder v. Massachusetts, supra, 291 U.S. at 102-22, this Court (per Justice Cardozo) rejected the defendant's argument that the state court violated his confrontation rights by permitting the jury to view the crime scene in the defendant's absence. Assuming without deciding that the Fourteenth Amendment made the Confrontation Clause applicable to the states, see id. at 106, Justice Cardozo observed that a state court procedure "does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar." Id. at 105. This Court explained that there had always been "recognized exceptions" to the "privilege of confrontation," such as dying declarations. Id. at 107. The Court added that the "exceptions are not even static, but may be enlarged from time to time if there is no material departure from the reason of the general rule." Id.

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[5] Similarly, the Court noted in Dowdell that the Confrontation Clause did not bar admission of documentary evidence used to prove collateral facts, because such evidence had been admissible at common law. See Dowdell, 221 U.S. at 330.

As noted, in 1965, Pointer held that the Confrontation Clause is applicable to the states. See Pointer, 380 U.S. at 403. After Pointer, this Court continued to make clear that the clause had not "constitutionalized" the general, common-law restrictions on hearsay. For instance, in California v. Green, 399 U.S. 149 (1970), this Court held that the defendant's confrontation rights were not violated by a California hearsay rule which, contravening the "orthodox" common law rule, allowed admission of prior inconsistent statements for their truth. See id. at 153-64. While noting that the Confrontation Clause and hearsay rules sometimes "protect similar values," this Court stated pointedly that the clause does not represent "a codification of the rules of hearsay and their exceptions as they existed historically at common law." Id. at 155. On the contrary, "merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied." Id. at 156. Notably, in concurrence, Chief Justice Burger "emphasize[d] the importance of allowing the States to experiment and innovate." Id. at 171. Justice Harlan, too, observed that the Confrontation Clause protects against "flagrant abuses" and does not "ordain common law rules of evidence with constitutional sanction." Id. at 179.

In the same vein, this Court held in Dutton v. Evans, 400 U.S. 74 (1970), that the Confrontation Clause did not prevent Georgia from adopting a hearsay rule under which coconspirator statements were admitted more liberally than under federal law. This Court emphasized that the relatively limited federal hearsay exception was "a product, not of the Sixth Amendment," but of other policy concerns. Id. at 82. Moreover, the defendant's challenge to

the Georgia rule did not fall within the core of the confrontation right, because it did not involve, for instance, "a confession made in the coercive atmosphere of official interrogation" or a "wholesale denial of cross-examination." Id. at 87. Likewise, in concurrence, Justice Harlan observed that it was not the "core purpose" of the Confrontation Clause to "prevent overly broad exceptions to the hearsay rule," because "the clause is simply not well designed for taking into account the numerous factors that must be weighed in passing on the appropriateness of rules of evidence." Id. at 94, 96.

Underpinning the notion that the Confrontation Clause served a limited, core purpose, nearly all of this Court's confrontation cases from the era of Pointer, Dutton, and Green -- like the earlier cases from the Mattox era -- prohibited the introduction only of formal statements akin to affidavits or depositions, such as prior sworn testimony or confessions obtained as a result of police interrogation. See, e.g., Mancusi v. Stubbs, 408 U.S. 204, 213-16 (1972) (prior testimony); Green, 399 U.S. at 151-52 (preliminary hearing testimony and inculpatory statement to the police); Roberts v. Russell, 392 U.S. 293, 293-95 (1968) (codefendant's confession); Bruton v. United States, 391 U.S. 123, 126-28 and n. 3 (1968) (same); Berger v. California, 393 U.S. 314 (1969) (preliminary hearing testimony); Barber v. Page, 390 U.S. 719, 720-25 (1968) (same); Brookhart v. Janis, 384 U.S. 1, 4 (1966) (codefendant's confession); Douglas v. Alabama, 380 U.S. 415, 416-20 (1965) (same); Pointer, 380 U.S. at 401-08 (preliminary hearing testimony). In fact, prior to 1980, this Court heard hardly any cases in which defendants alleged that the admission of non-formalized hearsay statements violated their confrontation rights. And, when faced with such claims, this Court rejected them out of hand. See

Dutton, 400 U.S. at 76-90 (statement of coconspirator); Delaney v. United States, 263 U.S. 586, 590 (1924) (same).

C. Ohio v. Roberts and the "Constitutionalization" of Hearsay Law

This Court charted a new course in Ohio v. Roberts, 448 U.S. 56 (1980), subjecting every hearsay statement admitted at a criminal trial to Confrontation Clause scrutiny. Notably, the contested evidence in Roberts -- a witness's sworn testimony at a preliminary hearing, see id. at 58-59 -- fell within the core class of statements to which the Confrontation Clause had always been applied. Hence, the Court in Roberts had no need to consider whether the Confrontation Clause applied to all hearsay. And notably, the Roberts Court expressed no desire to "map out a theory" of confrontation that "would determine the validity of all hearsay . . . exceptions." Id. at 64-65 (internal quotations omitted). Nevertheless, seeking a general standard to reconcile the Confrontation Clause and the hearsay rule, this Court held that the prosecution could not "normally" introduce the hearsay statement of a nontestifying declarant without first demonstrating the declarant's unavailability. Id. at 66. Even then, the statement was admissible only if it fell within a "firmly rooted" hearsay exception or bore other "particularized guarantees of trustworthiness." Id.[6]

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[6] In Roberts, the Court held that admission of the witness's preliminary hearing testimony did not violate the defendant's confrontation rights, because the hearing testimony bore sufficient indicia of reliability. See Roberts, 448 U.S. at 70-74. The Court eschewed a resolution more compatible with the traditional interpretation of the clause: that the defendant's (continued . . .)

Significantly, even while applying the far-reaching Roberts standard, this Court abided generally by the core principles of the Confrontation Clause. That is, the Court held formalized hearsay accusations, including statements made during police-arranged interrogations, inadmissible under the clause and permitted the admission of less-than-formal declarations. Compare Lilly v. Virginia, 527 U.S. 116, 120-21, 127-39 (1999) (holding that admission of accomplice's confession to the police, which incriminated defendant, violated defendant's confrontation rights); Idaho v. Wright, 497 U.S. 805 (1990) (state court violated defendant's confrontation rights by admitting statements made by child victim to pediatrician during examination of victim arranged by police and child welfare officials); and Lee v. Illinois, 476 U.S. 530, 546-47 (1986) (codefendant's confession to the police was improperly admitted at defendant's trial); with White v. Illinois, 502 U.S. 346, 348-58 (1992) (holding that the Confrontation Clause did not bar admission of excited statements made by the child victim to her babysitter, her mother, and a police officer who arrived on the scene); and United States v. Inadi, 475 U.S. 387, 388-400 (1986) (holding that the Confrontation Clause did not require the prosecutor to prove unavailability before introducing the statements of a nontestifying coconspirator).

Moreover, even while the Roberts standard prevailed, this Court acknowledged that the Confrontation Clause should not be viewed as a "general rule prohibiting

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confrontation rights were not violated because he had an opportunity to examine the witness at the preliminary hearing. See Crawford, 541 U.S. at 58; Roberts, 448 U.S. at 70.

the admission of hearsay statements." Wright, 497 U.S. at 814; see also White, 502 U.S. at 357 (declining to interpret the Confrontation Clause to work a "wholesale revision of the laws of evidence") (internal quotations omitted); Inadi, 475 U.S. at 392 ("Roberts itself disclaimed any intention of proposing a general answer to the many difficult questions arising out of the relationship between the Confrontation Clause and hearsay"); cf. Lilly, 527 U.S. at 137 (analogizing accomplice confession at issue to "the core concerns of the old ex parte affidavit practice").

The attempt of Roberts to "steer a middle course," White, 502 U.S. at 352 (quoting Roberts, 448 U.S. at 68 n. 9), ultimately failed. Almost from its inception, Justices and commentators criticized Roberts for abandoning a century of precedents regarding the core meaning of the Confrontation Clause. Concurring in White, Justice Thomas (joined by Justice Scalia) argued that the Roberts standard "complicated and confused the relationship between the constitutional right of confrontation and the hearsay rules of evidence" by assuming that "all hearsay declarants are 'witnesses against' a defendant within the meaning of the Clause" -- "an assumption that is neither warranted nor supported by the history or text" of the Sixth Amendment. White, 502 U.S. at 358-59 (Thomas, J., concurring) (emphasis in original). Justice Thomas advocated a return to the historical interpretation that "the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." Id. at 365; see also Lilly, 527 U.S. at 143-44 (Thomas, J., concurring).

Similarly, in Lilly, Justice Breyer argued that the effort to "tie the [Confrontation] Clause so directly to the

hearsay rule" was "of fairly recent vintage" and that the reliability standard of Roberts was "too narrow and too broad" when viewed in light of the "traditional purposes" of the clause. Lilly, 527 U.S. at 140-41 (Breyer, J., concurring). Specifically, Justice Breyer explained that the reliability rule was too broad, because it "would make a constitutional issue out of the admission of any relevant hearsay statement," even one "made long before the crime occurred and without relation to the prospect of a future trial." Id. at 142 (emphasis in original). In addition, the reliability rule was too narrow, because it would permit admission of "testimony" prepared out of court so long as it fell within a "well-recognized hearsay rule exception." Id. at 141. Justice Breyer also questioned the notion, implicit in the Roberts standard, that the Sixth Amendment inquiry should focus on the "trustworthiness" of the statement at issue. See id. at 142. Justice Breyer predicted that, in a future case, it might be necessary to "reexamine the current connection between the Confrontation Clause and the hearsay rule." Id.; see also Amar, Confrontation Clause First Principles, 86 Geo. L.J. at 1048-49; Friedman, Confrontation: The Search for Basic Principles, 86 Geo. L.J. 1011 (1998).

Part Two: The Supreme Court Returns to the Core Principles of the Confrontation Clause in Crawford v. Washington

A. Crawford Overrules Roberts and Restores the Understanding that the Confrontation Clause Is Aimed at Only a Limited Class of Hearsay.

In Crawford, supra, this Court rejected the Roberts analysis and returned to an understanding of the Confrontation Clause consistent with its jurisprudence for

the 100 years prior to Roberts. This Court held that Roberts had wrongly departed from the historical focus of the Confrontation Clause, which was to prevent the "use of ex parte examinations as evidence against the accused." Crawford, 541 U.S. at 50. This Court explained that the confrontation right was designed to redress flagrant abuses that occurred in civil-law practice and under the Marian statutes in 16th- and 17th-century England, and particularly during the treason trial of Sir Walter Raleigh. See id. at 43-47. A confrontation right restricting the prosecutorial use of ex parte examinations arose as a result. See id. at 45-47.

Further, the text of the Confrontation Clause, which guarantees an accused the right to confront the "witnesses" against him, Crawford, 541 U.S. at 51, demonstrates its focus. "Witnesses," this Court noted, are "those who 'bear testimony.'" Id. (quoting 1 N. Webster, An American Dictionary of the English Language (1828) (emphasis added)). Hence, the Confrontation Clause was designed to prevent "admission of testimonial statements of a witness who did not appear at trial." Id. at 53-54 (emphasis added).[7] The clause was not, as Roberts suggested, aimed at all hearsay. Id. at 51 ("not all hearsay implicates the Sixth Amendment's core concerns"). Crawford plainly stated that Roberts had reached too far in subjecting all hearsay to "close constitutional scrutiny." Crawford, 541 U.S. at 60; see also Wright & Graham, Federal Practice

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[7] Consistent with the confrontation right, the prosecution may introduce even a testimonial statement of a nontestifying witness if the witness is unavailable and the defendant had a prior opportunity to cross-examine him. See id. at 54; accord Mattox, 156 U.S. at 240-43.

and Procedure: Evidence §§ 6343, 6344, pp. 326-30, 345, 393-94 (1997).

Significantly, Crawford cited this Court's pre-Roberts precedents with approval, finding them "largely consistent" with the principles underlying the Confrontation Clause. See Crawford, 541 U.S. at 57. Crawford also approved the "outcomes," if not the reasoning, of this Court's decisions during the Roberts era, stating that the results "hew[ed] closely to the traditional line." Id. at 58.[8] The Crawford Court adopted a new standard not in order to overrule precedents, but to guide lower courts, which had received little meaningful direction from the "amorphous" Roberts reliability rule. See id. at 63-64. In short, Crawford admonished lower courts to enforce core confrontation principles strictly and, when faced with cases outside the core, to forestall the "constitutionalization" of ordinary hearsay rules.

All of this explodes the central theme of the brief of petitioner Davis. As noted, Davis' argument assumes that the Confrontation Clause is a "super" codification of all hearsay rules extant in 1791. Thus, according to Davis, if there was no hearsay exception for "excited utterances" in

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[8] This Court found possible "tension" in only one of the Roberts-era cases, White v. Illinois, supra, noting that the child victim's statement to the investigating officer in that case might not have been admissible under the historical understanding of the confrontation right. See id. at 58 n. 8. NDAA submits that, under a proper understanding of what hearsay is "testimonial," there is no "tension" at all; the victim's statement to the investigating officer was not testimonial, and thus was properly received. See Part Two (B) and Part Three, infra.

1791, the Confrontation Clause bars them. But, as explained in Crawford and in this Court's pre-Roberts decisions, the clause is aimed at only a limited class of hearsay statements: those which are "testimonial." Hence, the constitutional inquiry does not turn on whether excited utterances were admissible under a recognized hearsay exception in 1791 (or upon the adoption of the Fourteenth Amendment in 1868). Instead, the critical question is whether a particular utterance is "testimonial" within the meaning of the clause.[9]

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[9] Petitioner Davis would find support for his position in a footnote in Crawford which discusses dying declarations, 541 U.S. at 56 n. 6, but he misunderstands that footnote. In it, the Court notes that all dying declarations arguably are admissible, because an exception to the hearsay rule for dying declarations was recognized before 1791. Petitioner Davis believes that this amounts to an endorsement of his thesis that the Confrontation Clause allows the admission of hearsay only if an exception for such hearsay was recognized by 1791. See Davis Brief: 23; see also Hammon Brief: 29. But this Court did not by any means endorse petitioner's view. The Court simply stated that, because of the vintage of the dying declaration exception, even a testimonial dying declaration might be admissible. The Court did not state that all more-recently recognized hearsay exceptions are unconstitutional. Petitioner Hammon makes a similar mistake as to excited utterances. See Hammon Brief: 22-23.

B. Crawford limits the class of "testimonial" statements to those akin to the ex parte affidavits used in Marian times.

Petitioner Hammon's brief, and the amici submissions of defense groups and civil liberties organizations, appear generally to recognize that the Confrontation Clause applies only to "testimonial" hearsay. The flaw in these briefs is that they define testimonial hearsay far more broadly than is justified. According to the definitions proposed in these briefs, testimonial declarations include any "accusatory" statement, or any statement made by a person who reasonably would expect that the utterance will be of any use to law enforcement. See, e.g., Hammon Brief: 7-8, 41; Brief of NACDL: 3, 3-4, 5, 7-9, 14-17, 21, 23; ACLU Brief: 8, 14.[10] These tests have one thing in common: they find no basis in Crawford or earlier decisions of this Court.

As Crawford explained, the Roberts test had departed from "historical principles" by being "too broad," since it applied "the same mode of analysis" to all hearsay, whether or not it "consist[ed] of ex parte testimony." Crawford, 541 U.S. at 60. In addition, the Roberts test was "too narrow," because it allowed the admission of "ex parte testimony upon a mere finding of reliability." Id. Hence,

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[10] The latter two references are, more formally, to the brief submitted in the Hammon case by "The National Association of Criminal Defense Lawyers and the Public Defender Service for the District of Columbia" and to the brief submitted in both cases by "The American Civil Liberties Union, the ACLU of Washington and the Indiana Civil Liberties Union."

this Court adopted a new standard in Crawford, focused on ex parte "testimonial" statements, in order to return the Confrontation Clause to its proper concern. That is, this Court sought to remove "close constitutional scrutiny" from most hearsay while ensuring strict enforcement of the clause for "paradigmatic confrontation violations." See Crawford, 541 U.S. at 60.

In promulgating this standard, Crawford adopted a limited definition of "testimonial." "Testimony" means a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." Crawford, 541 U.S. at 51 (quoting 1 N. Webster, An American Dictionary of the English Language (1828)). Hence, an "accuser who makes a formal statement to government officers" bears "testimony" within the meaning of the Confrontation Clause. Others, such as "a person who makes a casual remark to an acquaintance," do not. Crawford, 541 U.S. at 51. Therefore, at its core, the confrontation right is concerned with formal declarations such as "prior testimony at a preliminary hearing, before a grand jury, or at a former trial" -- and also "police interrogations" -- because those "are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." Id. at 68.

In finding that these types of statements were testimonial, Crawford did not attempt to provide a precise definition of "testimonial" declarations. The Court did, however, identify three possible definitions of this core class of statements: (1) "ex parte in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used

prosecutorially"; (2) "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; and (3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Id. at 51-52.

We submit that the first two definitions, which are quite similar, correctly suggest the boundaries of "testimonial" hearsay. Under both definitions, a "testimonial" declaration would be a statement (1) created in a formal, out-of-court examination by a government agent (2) of a declarant aware that the statement was intended for use at a trial. Both definitions are consistent with this Court's pre-Roberts interpretations of the Confrontation Clause, which make plain that the clause excludes only formal hearsay statements. In that regard, both definitions include only "solemn declarations or affirmations." And both encompass the examples of testimonial hearsay identified in Crawford. See Crawford, 541 U.S. at 68. Helpfully, these definitions likewise simplify the task of the lower courts. They moot any debate about whether subjective motives or understandings of the speaker, or the listener, control whether a statement is "testimonial." See, e.g., Hammon Brief: 14-21. And they effectively eliminate the need to engage in speculation about the mental states of unavailable declarants.

Simply put, when an affidavit is signed or a statement is taken in a formal setting, both the declarant and the interrogator are well aware that it can be used for trial. It is only when both the declarant and the interrogating official are aware that a statement is being

taken for possible use at trial that the statement is "testimonial."

The third possible definition of testimonial hearsay reported in Crawford is not supported by any of this Court's pre-Roberts holdings. But even that formulation is far narrower than the ones proposed by petitioner Hammon and the supporting amici. Petitioner Hammon insists that "testimonial" hearsay includes any statement that the declarant might reasonably expect to be used for any law enforcement purpose, and not just at trial (Hammon Brief: 12-13, 18). For example, petitioner would have it that a victim's spontaneous statement to a 911 operator that he needs aid because he has been shot is no different from a sworn deposition or prior trial testimony. Needless to say, petitioner cites no precedent from this Court in making that suggestion.

Alternatively, petitioner Hammon urges this Court to rule that "a statement made to a known police officer (or other government agent with significant law enforcement responsibilities) and accusing another person of a crime is testimonial within the meaning of Crawford" (Hammon Brief: 7, 10). He thus would remove from consideration whether either party to a statement anticipated its subsequent law enforcement use, and focuses only on whether the statement qualifies as an "accusation" – however an "accusation" might be defined. But petitioner Hammon weaves this test too from whole cloth, rather than any Confrontation Clause decision of this Court. Even the third possible definition of "testimonial" hearsay identified in Crawford suggests specifically that the declarant must believe that the statement would be used at the subsequent trial, and not that it simply is "accusatory." And petitioner Hammon's test would sweep into the "testimonial" category

an infinite number of statements that are not remotely "solemn declarations or affirmations." Crawford, 541 U.S. at 51.

Along those lines, Crawford made clear that many statements that might be useful to law enforcement are far afield from the core purpose of the confrontation right. For instance, the clause does not prevent prosecutorial use of an "off-hand, overheard remark" – for example, a "casual remark" made by a person to an acquaintance – because such a remark "bears little resemblance to the civil-law abuses the Confrontation Clause targeted." Crawford, 541 U.S. at 51. In acknowledging that the clause has nothing to do with such remarks, this Court made no exception for casual remarks that are "accusatory," including even remarks made to a police officer.

And Crawford made plain that the statements governed by the clause are "solemn" and "formal." Crawford, 541 U.S. at 51. Obviously, not every statement to a police officer, even when offered in answer to the officer's questions, is solemn or formal. Crawford is thus inconsistent with petitioner Hammon's "one size fits all" approach, in which any accusatory declaration made to law enforcement personnel is testimonial. For instance, a witness's statement asking a police officer for aid against an attacker, during the commission of a crime or shortly thereafter – "officer, get him, he just robbed me" -- is not testimonial. It is not formal. The declarant does not anticipate that it will be introduced at trial. Indeed, even if such a statement is elicited by the officer's inquiry as to what has just happened, the officer likewise does not expect the answer to become evidence at a trial.

That informal statements may be the product of police questioning calls to mind another aspect of the Crawford analysis. This Court noted in Crawford that responses to "interrogation" may be testimonial, 541 U.S. at 52-53. But the statement found by Crawford to be testimonial was the fruit of structured questioning in a station house. That interrogation was the equivalent of an interrogation by a Marian justice of the peace. A public official in Washington State asked questions after having been persuaded that a crime had occurred, and having narrowed the scope of his investigation. Pursuant to an agenda, that public official engaged in structured questioning to develop a particular theory about what occurred and who was responsible. Such inquiries are readily recognized as "interrogations" by anyone with a television set; we see them constantly on "Law and Order" and on many other drama shows. And, as Crawford and innumerable other court cases demonstrate, such formal, structured interrogations are a part of everyday police work. It is fair to consider them testimonial. See Berger, The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model, 76 Minn. L. Rev. 557, 601-02, 609 (1992).

But all that has to do with agenda-driven interrogations. An officer who responds to a crime scene will have little, if any, information concerning what has happened. The officer will need to garner facts to ascertain whether a crime occurred, whether anyone was hurt and is in need of medical assistance, whether a suspect is still in the area and, if so, whether he poses a danger to the civilians who have remained and to the officers who are looking for him. The need fully to understand what has happened will regularly require officers to elicit more than a brief synopsis of the crime from the witnesses and

victims. Still, these on-the-scene inquiries are not "interrogations" designed to produce an evidentiary statement for trial. The officer has no agenda other than to learn what happened. These informal inquiries thus are not "testimonial."[11]

Crawford has created dramatic uncertainty in the state and federal courts as to whether hearsay will now generally be barred in criminal prosecutions. That uncertainty is reflected in the myriad cases citing Crawford, some of which have read Crawford as petitioners do. Even the most routine applications of hearsay exceptions, including those involving collateral facts -- such as the maintenance of breathalyzer equipment or the absence of a record from a government file -- have been disallowed. See, e.g., People v. Orpin, 8 Misc. 3d 768, 796 N.Y.S.2d 512 (Justice Court, Town of Irondequoit, Monroe Co. 2005); People v. Niene, 8 Misc. 3d 649, 798 N.Y.S.2d 891 (Crim. Ct. N.Y. Co. 2005). And the disagreement about excited utterances, including those in 911 calls, has been profound. If petitioners are successful here, the result will be that in many thousands of cases every year, juries will be denied information that, before Crawford, was routinely considered competent evidence and was never believed to violate the right of confrontation.

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[11] Petitioner Hammon supposes that, if this Court maintains its view that only formal interrogations constitute "testimonial" hearsay, initial responders to crimes may simply decide to avoid foreknowledge of what they will face at crime scenes. Hammon Brief: 8, 37-40. That cynical view not only reflects unjustified contempt for law enforcement officers, but also absurdly underestimates their instinct for self-preservation.

But the understanding of the Confrontation Clause that is championed by petitioners, and that is now routinely disrupting criminal cases, has no basis in history. The discredited Roberts analysis resulted in the scrutiny of a vast number of hearsay statements under the clause, but barred hearsay only sporadically. Crawford substituted a rule absolutely barring hearsay in a narrow category -- "testimonial" hearsay – if the defendant had no opportunity to cross-examine the declarant. Petitioners conflate the two approaches, seeking to have their cake and eat it too. They would extend the Confrontation Clause to vast amounts of hearsay, and at the same time bar all that hearsay absolutely. NDAA asks this Court to reject petitioners' invitation to follow that novel and unprecedented path, for it would make it far more difficult to obtain just results in criminal cases.

Part Three: The Statements in the Present Cases are not "Testimonial," and Due Process should be the Ultimate Test of the Propriety of their Introduction at Trial

The statements at issue in the Hammon and Davis cases are not testimonial hearsay. They bear none of the indicia of the statements in the core area covered by the Confrontation Clause: they were not formal statements akin to testimony or affidavits, made for presentation in court.[12] To be sure, the declarants were asked questions by

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[12] An affidavit signed by the victim was of course introduced at the trial of petitioner Hammon. The Indiana Supreme Court considered the introduction of the affidavit to be harmless Crawford error, given the oral statements of the victim that were recounted at trial. See Hammon Brief: 4-6.

agents of the state. But there was no "interrogation" of the sort addressed in Crawford, in which officials with an investigative agenda seek to obtain evidence about a past crime. Rather, in each case the declarant spoke with an agent of the state who lacked advance knowledge even that a crime had taken place.

It remains to discuss a question left open in Crawford. The fact that the statements at issue are not "testimonial" places them outside the core area of confrontation rights protected by the Confrontation Clause. In Crawford, however, this Court left open the question of whether the clause offers some protection outside this core area of concern. See Crawford, 541 U.S. at 68. Amicus urges the Court now to state, consistent with its decisions before Roberts, that the Confrontation Clause addresses testimonial statements alone, and does not more generally constitutionalize a prohibition against hearsay.

If instead the Confrontation Clause applied outside the testimonial area, its application would presumably take one of two forms. First, the clause might – as petitioner Davis in particular has urged – be read to bar any hearsay as to which no exception was recognized in 1791. As noted above, however, that approach is flatly inconsistent with the history of the clause, especially as it has always been understood by members of this Court. The clause was never designed to freeze in place the law of evidence as in stood in 1791. Second, the clause might be read to bar "unreliable" non-testimonial hearsay. But in Crawford this Court justly laid to rest the Roberts reliability framework, and that framework would be as inadequate for admitting non-testimonial hearsay as it has proved to be for admitting all hearsay.

Petitioners seem to believe that the Confrontation Clause must be broadly read, lest the courts be flooded with hearsay beyond the narrow class of testimonial statements. Petitioner Hammon, for example, is troubled by fears that if only a narrow class of testimonial hearsay is covered by the clause, a witness could seal a statement in a pot, or provide an account to a friend with the understanding that the friend would then repeat it in court. See Hammon Brief : 11.

But those fears are groundless. The Confrontation Clause is of course not the only rule that keeps hearsay out of criminal proceedings. State constitutional provisions also guarantee confrontation, and many of those provisions might, in the post-Crawford world, be read more broadly than the Sixth Amendment. More importantly, the Federal Rules of Evidence and every state's law of evidence restrict the introduction of hearsay. The statement in a pot, and the account provided to a friend, would not be admissible in any jurisdiction.

Moreover, the Due Process Clauses of the Fifth and Fourteenth Amendments will always provide a "backstop," in the event that a state employs an unreasonably permissive rule on the admissibility of non-testimonial hearsay. Due Process has already been declared the basis on which a defendant can obtain relief when a state hearsay rule is unduly restrictive. Chambers v. Mississippi, 410 U.S. 284 (1973). Similarly, the Due Process Clause would afford a defendant relief when a state rule about non-testimonial hearsay is unduly permissive. Notably, for this Court to recognize that principle in Hammon and Davis would create a logical complement to Chambers. But when due process guarantees are not implicated, the Framers intended to leave each state free to adopt rules of evidence that seem sensible to its own citizens. See Estelle v.

McGuire, 502 U.S. 62, 67-70 (1991); Spencer v. Texas, 385 U.S. 554, 563-64 (1967) ("Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial. . . . But it has never been thought that such cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure").

* * *

The short-lived Roberts era aside, this Court has never understood the Confrontation Clause to regulate all hearsay or to work a substantial revision of the rules of evidence. And certainly, this Court never hinted that the clause barred the states from refining their views on the admissibility of excited utterances or of any other garden-variety types of hearsay. As Crawford explained, a hearsay declarant does not qualify as a "witness" for confrontation purposes unless he has made a "solemn declaration" akin to a formal statement under oath. A 911 call or an excited remark at the scene of a crime -- whether made to a responding officer or to anyone else -- is not "testimony" in any sense of the word. Petitioners twist the plain meaning of the clause in an effort to expand the constitutional right of confrontation beyond all plausibility and precedent.

CONCLUSION

The judgments against petitioners should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ADRIAN MARTELL DAVIS,
Petitioner,

v.

WASHINGTON,
Respondent.

HERSHEL HAMMON,
Petitioner,

v.

INDIANA,
Respondent.

On Writs of Certiorari to the Supreme Courts of Washington and Indiana

BRIEF OF *AMICI CURIAE* THE NATIONAL NETWORK TO END DOMESTIC VIOLENCE, INDIANA AND WASHINGTON COALITIONS AGAINST DOMESTIC VIOLENCE, LEGAL MOMENTUM, *ET AL.* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici include over fifty non-profit organizations devoted to remedying domestic violence through legal, legislative, and policy initiatives, as well as organizations and individuals providing shelter, advocacy, and legal and counseling services to survivors of domestic violence. *Amici* collectively have hundreds of years of experience working with survivors of domestic violence, including undertaking extensive efforts to improve the justice system's response to victims of domestic violence.

Amici are extremely concerned about the impact of the *Crawford* case on the ability of the State to prosecute domestic violence, hold batterers accountable, and provide protection to victims and their children. For these reasons, therefore, *Amici* are submitting this brief in support of the Respondents.[2]

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[1] Pursuant to Sup. Ct. R. 37.6, *Amici Curiae* state that no counsel representing a party authored this brief in whole or in part, and no person or entity other than the *Amici Curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] Pursuant to Sup. Ct. R. 37.3(a), counsel of record for both Petitioners and Respondents have consented to the filing of this brief in letters that have been lodged with the clerk. The identities and interest of *Amici* are described in Appendix A to this brief.

SUMMARY OF ARGUMENT

These cases present an opportunity to clarify the uncertainty created by *Crawford v. Washington*, 541 U.S. 36 (2004), which has led many prosecutors to drop domestic violence charges or seek to compel victims of abuse to testify under extreme duress. Adhering to the original meaning of the Confrontation Clause does not require this Court to ignore the brutal reality of domestic violence or permit batterers to evade prosecution by wielding the Clause as a sword against their victims.

Domestic violence is a pervasive problem with its roots in centuries of legal and social norms sanctioning men's use of violence in the family. Due to the judicial system's historic reluctance to prosecute these crimes and its inability to protect victims from the weapons of control available to batterers, many abused women are unwilling or unable to testify in criminal proceedings. Over time, the criminal justice system has recognized the forces that work to prevent victims from testifying and established alternative means to obtain reliable evidence. The resulting practice of "evidence-based" prosecution ensures that violent abusers are held accountable when their own conduct makes the victim's testimony impossible to obtain. In the short time since *Crawford* was decided, however, many prosecutors and courts have responded by dropping or dismissing charges in a disturbing range of cases. Adoption of a broad definition of "testimonial" will unquestionably further cripple the potential for evidence-based prosecution, all but ensuring that many violent criminals go unpunished and undeterred.

The Confrontation Clause addressed a specific evil identified by the Framers: unchecked State inquisitorial power designed to use out-of-court testimony from a witness in order to deprive the defendant of his opportunity to confront his accuser in court. In domestic violence prosecutions, a different evil exists: here, the defendant, not the State, seeks

to silence the key witness. In adopting the Confrontation Clause, the Framers did not and could not have fully anticipated this result, in which the only or key witness is subject to the control and coercion of the accused.

Determining the application of the Confrontation Clause to domestic violence—a phenomenon that was widespread at the time the Clause was adopted and whose effects on the judicial process were unexamined—necessarily involves "some degree of estimation." *Crawford v. Washington*, 541 U.S. 36, 52 n.3 (2004). Nonetheless, a definition of "testimonial" that is faithful to the original purpose of the Confrontation Clause will continue to allow some forms of evidence-based prosecution of domestic violence cases while protecting constitutional safeguards and preserving the integrity of the adversary process. *E.g.*, *id.* at 51 ("'*ex parte* in-court testimony or its functional equivalent'") (citation omitted); *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment) ("extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"). By contrast, Petitioners' over-broad definition would sharply undermine the State's ability to protect victims and hold batterers accountable; indeed, it would be incompatible with judicial fairness.

For these reasons, the judgments in *Davis v. Washington* (05-5224) and *Hammon v. Indiana* (05-5705) should be AFFIRMED.

ARGUMENT

I. THE LEGAL AND SOCIAL HISTORY OF DOMESTIC VIOLENCE CREATES UNIQUE BARRIERS TO PROSECUTION.

Domestic violence[3] is a profound social problem with far-reaching consequences.[4] It accounts for a substantial

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[3] We define domestic violence as the physical, sexual, psychological, and/or emotional abuse of a victim by her intimate partner, with the goal of asserting and maintaining power and control over the victim. *See, e.g.*, Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 Fordham L. Rev. 853, 853 (1994); Nichole Miras Mordini, Note, *Mandatory State Interventions for Domestic Abuse Cases: An Examination of the Effects on Victim Safety and Autonomy*, 52 Drake L. Rev. 295, 300 (2004). While domestic violence also plagues the elderly and children, this brief focuses on intimate partner violence. Women may perpetrate domestic violence, and violence also occurs in same sex relationships; the vast majority of victims, however, are women and their attackers are men. *See, e.g.*, Callie Marie Rennison, Bureau of Justice Stat., U.S. Dep't of Justice, Crime Data Brief: *Intimate Partner Violence, 1993-2001* 1 (NCJ 197838, Feb. 2003), http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf (women are 85% of victims).

[4] Approximately one in four women, and 7% of men, report having been physically assaulted by a current or former intimate partner. Patricia Tjaden & Nancy Thoennes, Nat'l Inst. of Justice & Ctrs. for Disease Control & Prevention, *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey* iv (NCJ 183781, Nov. 2000), http://www.ncjrs.gov/pdffiles/172837.pdf. Estimates of the number of American women assaulted and/or raped each year by an intimate partner range from 1.5 million to 4 million. *Id.* (1.5 million); Am. Psychol. Ass'n, *Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family* 10 (1996) (4 million). At least half of women murdered are killed by intimates. Violence Pol'y Ctr., *When Men Murder Women: An Analysis of 2003 Homicide Data* 3 (Sept. 2005), http://www.vpc.org/studies/wmmw2005.pdf (92% of female victims were murdered by someone they knew; 62% of these were killed by husbands or intimate partners).

proportion of criminal justice system activity.[5] Characterized by a pattern of terror, domination and control, domestic violence inexorably obstructs victims' efforts to escape abuse and achieve safety. The legal system has historically condoned (or, at best, ignored) domestic violence. Understanding this historical context is essential to properly applying the Confrontation Clause to contemporary cases.

A. Domestic Violence is Characterized by a Pattern of Terror, Domination and Control.

While physical violence is ordinarily the sole aspect of domestic violence that reaches the criminal justice system, battering includes many other forms of coercion and control. *See* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1, 93 (1991) ("battering is power and control marked by violence and coercion"). Most battered women are subjected to "an *ongoing* strategy of intimidation, isolation, and control that extends to all areas of a women's life, including sexuality; material necessities; relations with family, children, and friends; and work." Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 Alb. L. Rev. 973, 986 (1995). Batterers' means of disempowering and controlling their victims include not

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[5] Violence between intimate partners (spouses and boyfriends and girlfriends) accounted for 34% of all violent crimes recorded by police in eighteen states and the District of Columbia. Matthew R. Durose et al., Bureau of Justice Stat., U.S. Dep't of Justice, *Family Violence Statistics* 29 (NCJ 207846, June 2005), http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs05.pdf. In a study of eleven large counties during May 2000, approximately one third of felony assault charges involved family violence (broadly defined). *Id.* at 45.

only violence, but also sexual, emotional and economic abuse, psychological intimidation, social isolation, and threats to and about the children or other family members. *See* Appendix 65a, Letter 20[6] (victim "cut off from friends and family" and "truly believed" she had "no one to help"); Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 Hofstra L. Rev. 1191, 1204-06 (1993). Batterers often issue lists of "rules" that their partners and children are required to obey, at the risk of invoking violence. Karla Fischer, Neil Vidmar & Rene Ellis, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 S.M.U. L. Rev. 2117, 2126-29 (1993) (describing batterer and victim as "the Ruler and the Ruled"). *See also* App. 68a, Letter 21 (victim told she "didn't know how to be a woman," criticized for the way she "cooked, washed clothes, [wore] hair, raise[d their] child, everything"); App. 57a, Letter 11 (victim assaulted because she "didn't launder correctly").

Not surprisingly, victims' efforts to escape their abusers often lead to escalations of violence, owing to the threat such efforts pose to the batterer's control of the victim. Research consistently documents that "the greatest risk for serious injury or death from violence is at the point of separation or at the time when the decision to separate is made." Am. Psychol. Ass'n, *supra*, at 39; App. 49a, Letter 6 (describing murders of mothers and children after separation from abusers); Mahoney, *supra*, at 5-6, 65-68 (detailing stories of post-separation attacks). Indeed, 75% of the most serious injuries and deaths occur after battered women leave their abusers. *See* Barbara Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations*, 43

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[6] Appendix B is a compendium of letters from prosecutors, law enforcement officers, advocates, and victims about their relevant experiences in domestic violence cases.

Juv. & Fam. Ct. J. 34 (1992) (citations omitted). Batterers often specifically instruct their victims never to call the police. *See* App. 39a, Letter 1 (victim told by her batterer that "if she ever called 911 on him, he would come back and kill her"). Pursuing prosecution, thus, is not only an assertion of autonomy, it directly defies the abuser's control, exposing the victim to considerable risk of violence.

B. The Legal System Has Historically Condoned or Ignored Domestic Violence.

Batterers' ability to control their victims has been facilitated by the failure of the legal system to respond adequately to incidents of domestic violence. The Violence Against Women Act of 1994 was enacted by Congress after extensive legislative hearings documenting the historic and pervasive failure of state criminal justice systems to respond appropriately to domestic violence and sexual assault, including substantial documented gender bias in the courts. *The Violence Against Women Act of 1993*, S. Rep. No. 103-38, at 41-47 (1993); G. Kristian Miccio, *A Reasonable Battered Mother? Redefining, Reconstructing and Recreating the Battered Mother in Child Protective Proceedings*, 22 Harv. Women's L.J. 89, 90 (1999) (VAWA reflects Congress' finding that "the state, through nonfeasance and misfeasance, contributes to the systemic abuse of women within the family"). Such findings were not new. *See* U.S. Dep't of Justice, *Attorney General's Task Force on Family Violence: Final Report* 16-18 (Sept. 1984); Gail A. Goolkasian, Nat'l Inst. of Justice, *Confronting Domestic Violence: A Guide for Criminal Justice Agencies* 55 (May 1986) (describing historical reluctance of prosecutors to take domestic violence cases seriously).

Modern judicial inadequacies are in part a product of history. Until approximately the late 19th century, wives were legally subordinated to their husbands. "By law, a husband acquired rights to his wife's person . . . . A wife was

obliged to obey and serve her husband . . . . As master of the household [he] could command [her] obedience, and subject her to corporal punishment or 'chastisement' if she defied his authority." Reva B. Siegel, *'The Rule of Love': Wife Beating as Prerogative and Privacy*, 105 Yale L.J. 2117, 2122-23 (1996); 1 William Blackstone, *Commentaries* *421, *444-45. Reported decisions endorsed Blackstone's "modest chastisement," *Bradley v. State*, 1 Miss. (1 Walker) 156, 158 (1824) and approved of force "to control [a wife's] unruly temper." *State v. Black*, 60 N.C. 262 (1864). *See generally* Siegel, *supra*, at 2122-25 & n.25 (collecting cases); Rebecca Emerson Dobash & Russell P. Dobash, *Violence Against Wives* 31-74 (1979) (surveying history of wifebeating and laws through the early 20th century).

More recently, although the legal system no longer endorsed these antiquated gender distinctions, police and prosecutors continued a policy of indifference to domestic violence victims, fueled by society's belief in the trivial and non-criminal nature of this abuse. *See* Dobash & Dobash, *supra*, at 207-22; James B. Halsted, *Domestic Violence: Its Legal Definitions, in Domestic Violence: The Changing Criminal Justice Response* 143, 155 (Eve S. Buzawa & Carl G. Buzawa eds., 1992). Up until at least the 1980s, police typically ignored domestic violence calls or purposely delayed their response. *See AG's Task Force Final Report*, *supra*, at 16-18; Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. of Crim. L. & Criminology 46, 46-60 (1992); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 Harv. L. Rev. 1849, 1857 (1996). Studies conducted in the 1980s and 1990s found that arrests occurred in only 3 to 14% of all intimate partner cases to which officers actually responded. Eve S. Buzawa & Carl G. Buzawa, *supra, Introduction, in Domestic Violence: The Changing Criminal Justice Response* (1992) at vii, xvi. Similarly, prosecutors historically resisted prosecuting abuse,

downgraded severe violence to misdemeanor charges, and were all too eager to drop cases when victims expressed any ambivalence.[7] Only recently, under pressure from domestic violence advocates, have police and prosecutors around the country begun to take domestic violence seriously and to develop effective means of prosecuting it. *See* Sec. II.B., *infra*.

II. BATTERING CREATES A DYNAMIC THAT COMPROMISES THE TRUTH-GATHERING FUNCTION OF THE PROSECUTOR AND REQUIRES THE USE OF ALTERNATIVE RELIABLE EVIDENCE.

Because victims of domestic violence remain very much at risk after separation or reporting of their abuse, and because the legal system has often failed to protect them, many victims are ambivalent or fearful about prosecution. They report being threatened by their abusers that their children will be hurt, App. 54a, Letter 9, fearing that they will be killed and their children taken, App. 49a, Letter 6, and feeling that "the court system doesn't care," App. 64a, Letter 19. *See also* App. 54a, Letter 9 (defendant called victim at work notwithstanding no-contact order and "threatened that if she did not drop the charges, he would continue to harass her and her kids" and that "[h]e tried to kill her before, but . . . the next time he [would] not fail to do so"); App. 56a, Letter 10 (defendant dissuaded victim from

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[7] As one prosecutor stated: "When I look back at how it used to be with battered women, I can see that it was a self-fulfilling prophesy. We'd file if she really wanted us to, but we knew that she'd want us to drop charges later . . . we may have even told her so. Then we sent her back home, often back to her abuser, without any support or protection at all. Sure enough, she wouldn't follow through and we'd think, 'It's always the same with these cases.'" Goolkasian, *supra*, at 55.

testifying by telling her he'd kill her). Indeed, one survivor writes:

> [I]t's not easy to testify against someone you love, someone who has hurt you, someone you are afraid of, someone you depend on, someone you have a child with or someone who scares the hell out of you. For me . . . all of those things are in one person.

App. 81a, Letter 32.

A. Domestic Violence Places Most Battered Women in an Untenable Position With Regard to Criminal Prosecution.

While some battered women eagerly pursue criminal prosecution as a means of seeking safety and accountability, many others fear participation in the judicial process, for several reasons. A paramount concern is fear for their safety and that of their children. James Ptacek, *Battered Women in the Courtroom* 145-49 (1999) (detailing fear of retaliation). Studies back this up. Tom Lininger, *Prosecuting Batterers After Crawford*, 91 Va. L. R. 747, 769 (2005) (threats of retaliatory violence in as many as half of all cases; 30% of battered women reassaulted while batterer being prosecuted). *See generally* Deborah Epstein, Margret E. Bell & Lisa A. Goodman, *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 Am. U. J. Gender Soc. Pol'y & L. 465, 467 n.4, 476-77 (2003).

> [W]hen it came time to press charges . . . I got scared to go to court and face him. He would threaten me that if he went to jail I would be sorry.

App. 76a. Letter 27.

> [J]ust the thought of having to testify against him made me sick—I shook uncontrollably the first three times I was there . . . I can't begin to explain how scary it is to have to see your abuser again and for him to see you, especially in a courtroom, because there's no guarantee of safety once you leave it.

App. 75a-76a, Letter 25.

Victims who take action against or leave an abuser also risk losing their children. One study found that 25% of batterers directly threatened kidnapping the victim's children if legal action was pursued; they also frequently threatened to lie or exaggerate the victim's personal problems to protective services. Eve S. Buzawa & Carl G. Buzawa, *Domestic Violence: The Criminal Justice Response* 3, 88 (James A. Inciardi ed., 2d ed. 1996); Ptacek, *supra*, at 140 (more than half the time, batterers threaten to take children, file for custody, or report victim to social services). Surprisingly often, when the parties separate, batterers win joint or sole custody of children. Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 A.U. J. of Gender, Soc. Pol. & Law 657, 662 n.19 & accompanying text (2003).

In addition, many victims face untenable economic choices. *See* Buzawa & Buzawa, *supra*, *Domestic Violence: The Criminal Justice Response* (2d ed. 1996) at 88-89 (finding economic threats made by 42% of abusers). Where victims are unemployed or earning very little, the threat of loss of financial support can be critical. *Id.* (31% of the victims were unemployed and 67% earned under $10,000). Even victims who are employed regularly face myriad acts of sabotage, harassment, and interference designed to undermine their own access to income. *See, e.g.*, Washington State University et al., *Intimate Partner Violence . . . It's a Work-place Issue* 17 (Jan. 2005), http://www.caepv.org/member

center/files/Intimate%20Partner%20Violence-A%20Workplace%20Issue%20Spokane%20Co.%20(January%202005).pdf (34% of employed female intimate partner violence victims report work disruption by partner's violence); Jody Raphael & Richard M. Tolman, *Trapped In Poverty; Trapped By Abuse: New Evidence Documenting the Relationship Between Domestic Violence and Welfare* (Apr. 1997), http://www.ssw.umich.edu/trapped/ pubs_trapped.pdf.

Perhaps the most pervasive aspect of battering that undermines victims' ability to testify is trauma. "The common denominator of psychological trauma is a feeling of 'intense fear, helplessness, loss of control, and threat of annihilation.'" Judith Herman, *Trauma and Recovery* 28, 32 (1992) (citation omitted). After the concept of post-traumatic stress disorder gained legitimacy in the 1980s, it became "clear that the psychological syndrome seen in survivors of rape, domestic battering, and incest was essentially the same as the syndrome seen in survivors of war." *Id.* at 32. Trauma can profoundly disable a person's ability to lead a normal life and can short-circuit their emotional and psychological functioning.

Most importantly, "[e]fforts to seek justice or redress often involve further traumatization," because, among other things, "this decision engages the survivor with a legal system that may be indifferent or hostile to her." *Id.* at 72, 165. Testifying in court forces a victim to face her terrorizer, retell the trauma to his face, and endure potentially aggressive cross-examination. App. 56a, Letter 9 (every time victim sees her boyfriend or even a photograph, she re-lives both the rape and the battering); App. 60a-61a, Letter 14; App. 63a, Letter 18. All of these phenomena are massive triggers for re-traumatization. As one survivor put it:

> Today, even ten years later, after years of counseling to become whole again—I still have a hard time facing him in court in matters involving the children. Over ten years after my last beating it still makes me throw-up when I have to face him. I break out in a horrible, drenching cold sweat. I shake from the tips of my fingers to toes, [which] I usually have to consciously place on the ground with force to stop my heels from clacking in the courtroom. . . . I often have to seek medical attention afterwards for migraines.

App. 67a, Letter 20. In short, "if one set out by design to devise a system for provoking intrusive post-traumatic symptoms, one could not do better than a court of law." Herman, *supra*, at 72; Epstein et al., *supra*, 11 Am. U. J. L. & Soc. Pol. at 474-75.

The net effect of all these obstacles is that battered women are far more likely to avoid participation in criminal trials or recant their accusations than any other crime victims. Lininger, *supra*, at 768. It is estimated that battered women recant or refuse to cooperate with the prosecution approximately 80-90% of the time. *Id.*; Douglas E. Beloof & Joel Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, 11 Colum. J. Gender & L. 1, 3-4 (2002). A study in New York City found that 80-90% of victims in domestic violence cases refuse to cooperate. Richard R. Peterson, *Combating Domestic Violence in New York City: A Study of DV Cases in the Criminal Courts*, CJA Final Report 9-10 (Apr. 2003), http://www.nycja.org/research/reports/ressum43.pdf. In the 1980s and 1990s, as many as 60-80% of domestic violence cases were abandoned for this reason. Lininger, *supra*, at 771 n.121; Buzawa & Buzawa, *supra*, *Domestic Violence: The Criminal Justice Response* (2d ed. 1996) at 87. In Brooklyn

and Milwaukee, the most common reason for dismissal of domestic violence prosecutions was victims' failure to make court appearances or to testify against the defendants. Lininger, *supra*, at 769; App. 41a, Letter 1 (in 2005 in Milwaukee, 96% of dismissals occurred because victims did not appear in court for trial).

B. Evidence-Based Prosecution is Often the Only Effective Means to Hold Batterers Criminally Accountable.

Over the past three decades, concerted pressure from advocates and policy-makers[8] has led many police departments and prosecutors to revise their practices with respect to domestic violence. The development of evidence-based prosecution is among the most important of these reforms. Evidence-based prosecution focuses on the gathering of reliable evidence such as 911 tapes, photographs, medical records, spontaneous declarations by the victim to the officers, admissions by the defendant, neighbors' testimony, relatives' testimony, and general police officer testimony related to the case and the subsequent investigation, in order to make a case that does not depend on

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[8] The Department of Justice, the National Council of Juvenile and Family Court Judges, the International Association of Chiefs of Police, and the ABA have all issued authoritative policy documents supporting more aggressive criminal justice responses, including mandatory or pro-arrest policies, no-drop and evidence-based prosecution practices. *See, e.g., AG's Task Force Final Report*, *supra*; Goolkasian, *supra*; National Council of Juvenile and Family Court Judges, *Family Violence: Improving Court Practice* (1990) and *Family Violence: State-of-the-Art Court Programs* 55-86 (1992); International Association of Chiefs of Police, National Law Enforcement Policy Center, *Model Policy on Domestic Violence* (1996 & 1997); Am. Bar Ass'n, *The Impact of Domestic Violence On Your Legal Practice: A Lawyer's Handbook* 340-45 (2d ed. 2004) (recommending victim support and evidence-based prosecution).

victim cooperation. *See* Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 Wm. & Mary L. Rev. 1845, 1858 (2001); Casey G. Gwinn & Sgt. Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 W. St. U. L. Rev. 297, 313 (1993) (estimating that 60% of cases in San Diego are provable on the basis of this type of evidence).

Because it is not possible to require victims of domestic violence to testify in every case, evidence-based prosecutions have become the most effective means of furthering the compelling public interest in ensuring that violent abusers are brought to justice and victims are protected. Gwinn & O'Dell, *supra*, at 311; Epstein, *supra*, 43 Wm. & Mary L. Rev. at 1858; Corsilles, *supra*, at 877-78. In Duluth, evidence-based prosecution methods have resulted in a significant increase in the conviction rate. Mary E. Asmus, Tineke Ritmeester & Ellen L. Pence, *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies From Understanding the Dynamics of Abusive Relationships*, 15 Hamline L. Rev. 115, 136 (1991). In San Diego, the domestic violence unit obtains convictions in over 2000 cases every year using an evidence-based prosecution model. Gwinn & O'Dell, *supra*, at 314. About 30-40% of jurisdictions in the country have followed San Diego's evidence-based approach. Mark Hansen, *New Strategy in Battering Cases: About a Third of Jurisdictions Prosecute Even Without Victim's Testimony*, 81 ABA J. 14 (Aug. 1995). Without evidence-based prosecution, too many cases would be impossible to prosecute. *Cf.* Sec. III.A., *infra*.[9]

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[9] The ACLU and NACDL amicus briefs both argue that domestic violence prosecutions can be accomplished by other means, such as providing better support for victims, including the provision of safe living arrangements, more comprehensive social services and better communications about the case. Brief *Amicus Curiae* of the American Civil Liberties Union, the ACLU of Washington and the Indiana Civil Liberties

III. AN OVERLY EXPANSIVE VIEW OF THE TERM "TESTIMONIAL" WILL CONVERT THE CONFRONTATION CLAUSE FROM A SHIELD INTO A SWORD TO BE WIELDED AGAINST VICTIMS OF DOMESTIC VIOLENCE.

The rights accorded to defendants under the Confrontation Clause were intended as a "shield" to protect the defendant from potential prosecutorial abuses. *See Taylor v. Illinois*, 484 U.S. 400, 410 (1988). Adopting an overly expansive view of "testimonial" statements, as urged by Petitioners, will convert this "shield" into a sword to be wielded by batterers to silence their victims, crippling the ability to prosecute domestic violence cases and prejudicing the adversary process. Meanwhile, battered women will be subjected to increased state coercion, putting them at risk of further physical jeopardy or re-traumatization.

A. An Overly Expansive Definition of a "Testimonial" Statement Will Cripple the Prosecution of Batterers.

While *Crawford* is relatively recent, evidence has already emerged that it has significantly undermined the prosecution of domestic violence cases. App. 48a, Letter 5 ("the

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Union in Support of Petitioners at 22-24; Brief of *Amici Curiae* the National Association of Criminal Defense Lawyers and the Public Defender Service for the District of Columbia in Support of Petitioner Hammon at 28-29. While *Amici* agree that improved support and communication with victims by prosecutors' offices is important, it alone cannot possibly eliminate the dangers or trauma that impair victims' participation. Moreover, it is unrealistic to suggest that under-funded prosecutors' offices should somehow provide funds for safe housing and ensure comprehensive social services for victims. Indeed, in *Amici*'s experience, even existing witness protection programs are rarely (if ever) available for domestic violence victims.

Crawford opinion has had a devastating effect on my ability to prosecute these [domestic violence] cases"); Lininger, *supra*, at 749.[10] An extensive survey of over 60 prosecutors' offices in California, Oregon and Washington, provides valuable information about the impact of *Crawford*. *Id.*[11] Among the results: 63% of respondents reported that the *Crawford* decision significantly impeded prosecutions of domestic violence; 76% indicated that after *Crawford*, their offices were more likely to drop domestic violence charges when victims recant or refuse to cooperate; and 65% reported that victims of domestic violence are now less safe in their jurisdictions than during the era preceding the *Crawford* decision. *Id.* at 750.

Additional reports from numerous jurisdictions echo these findings, and indicate that prosecutors across the country are dropping cases, or pleading them down to lower offenses, because of *Crawford*. *See* Lininger, *supra*, at 749 ("within days—even hours—of the *Crawford* decision, prosecutors were dismissing or losing hundreds of domestic violence cases that would have presented little difficulty in the past") (footnotes omitted); Robert Tharp, *Domestic Violence Cases*

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[10] *See also* Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. Rich. L. Rev. 511, 608 (2005) ("*Crawford* has disrupted domestic violence prosecutions to a degree not seen in any other area. It erected a 'stop sign' in front of most of this evidence [evidence routinely used in victimless prosecutions], which combined with its reluctance to treat excited utterances as a historic exception to confrontation, has caused massive disruption and great uncertainty.") (footnote omitted).

[11] The survey was conducted by researchers at the University of Oregon School of Law between October 22, 2004, and January 31, 2005. The survey involved 64 counties, covering approximately 90 percent of the total population of California, Oregon, and Washington. Lininger, *supra*, at 749.

Face New Test: Ruling That Suspects Can Confront Accusers Scares Some Victims From Court, Dallas Morning News, July 6, 2004, at 1A (half of all domestic violence cases set for trial in Dallas are thrown out because of *Crawford*). A Denver prosecutor also recounted letting a man accused of viciously beating his girlfriend plead to lesser charges after the accused had called his girlfriend from jail and threatened to kill her when he got out. Sarah Huntley, *Ruling Ties Prosecutors' Hands; Cross-Examination Right Reaffirmed*, Rocky Mountain News, Feb. 8, 2005, at 7S. "Without *Crawford*," the prosecutor stated, "I wouldn't have made that offer . . . . I was left with the choice, if the victim didn't show, of possibly losing the whole case." *Id.*[12] An Assistant District Attorney from Georgia summarized: "the ultimate impact of Crawford . . . is crystal clear—that is, if domestic violence victims do not testify, no conviction follows." App. 44a-45a, Letter 2.

Moreover, a significant number of domestic violence-related convictions have been overturned because of *Crawford*.[13] These cases illuminate the very real consequences

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[12] *See also* Leonard Post, *Prosecutors Feel Broad Wake of "Crawford" ; Child Abuse Cases, 911 Calls Affected*, Nat'l L.J., Dec. 13, 2004, at 1 ("Since Crawford, tapes of 911 calls are no longer being routinely admitted under the excited-utterance exception to the hearsay rule, asserted Deirdre Bialo-Padin, chief of the district attorney's domestic violence bureau in Brooklyn, N.Y. 'Some judges are being very conservative,' she said.").

[13] *See, e.g., People v. Adams*, 16 Cal. Rptr. 3d 237 (Cal. Ct. App. 2004) (vacating conviction of boyfriend for inflicting corporal injury upon a cohabitant by battering her, pushing her to the ground and pushing his knee down into her abdomen while she was pregnant, because introduction of the girlfriend's statements to the police violated *Crawford*), *review granted*, 99 P.3d 2 (Cal. 2004); *Miller v. State*, 615 S.E.2d 843 (Ga. Ct. App. 2005) (overturning husband's convictions for terroristic threats and obstructing a person making an emergency phone call because failure of wife to testify at trial meant introduction of her statements to police officers violated *Crawford*, but upholding convictions for aggravated assault and battery), *accord* App. 43a-45a, Letter 2 (*id.*); *State*

that *Crawford* has had on state efforts to prosecute crimes of domestic violence. The recent ruling by the United States Court of Appeals for the Ninth Circuit in *Bockting v. Bayer*, 399 F.3d 1010, *amended*, 408 F.3d 1127 (9th Cir. 2005), which applies *Crawford* retroactively, suggests that *Crawford* is not just an impediment to future convictions, but has the potential to undo many past convictions as well.

B. Making Criminal Prosecution Dependent on Victims' Testimony Will Deliver Control of Domestic Violence Cases into the Hands of Abusers.

If this Court adopts an overly expansive standard for "testimonial" statements it will likely strengthen the power that batterers already wield against their victims once charges are filed. Knowing the impact their actions will have on the prosecution, batterers may decide to disregard no-contact orders and confront their victims outside the courtroom in an

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v. Grace, 111 P.3d 28 (Haw. Ct. App.) (overturning husband's conviction for abuse of a family member due to *Crawford* violation), *cert. denied*, 107 Haw. 348 (2005); *People v. Victors*, 819 N.E.2d 311 (Ill. Ct. App. 2004) (reversing boyfriend's conviction for domestic battery because introduction of victim's statements to police officer that he pushed, punched and choked her violated *Crawford*), *appeal denied*, 214 Ill. 2d 549 (2005); *State v. Siler*, No. 02 COA 028, 2005 Ohio App. LEXIS 5933, at *16 (Ohio Ct. App. Dec. 13, 2005) (overturning husband's murder conviction of wife because statements made by the couple's son describing his father's hanging of his mother to a police officer violated *Crawford*); *Mason v. State*, 173 S.W.3d 105 (Tex. Ct. App. 2005) (overturning boyfriend's assault conviction because introduction of victim's statements to police officer's violated *Crawford*); *State v. Powers*, 99 P.3d 1262 (Wash. Ct. App. 2004) (overturning conviction for violating a domestic protection order because victim's 911 call telling operator the defendant had come to her home was testimonial).

effort to intimidate them, "wielding the *Crawford* decision as [a] sword." App. 41a, Letter 1.

It is a predictable fact of life in domestic violence cases that once an arrest is made, the abuser can be expected to mobilize all the means at his disposal to force the victim into silence and stop the prosecution. *See* Gwinn & O'Dell, *supra*, at 310 ("abusers [became] more violent and aggressive toward the victim when they learned that she controlled the outcome of the criminal prosecution."); Thomas L. Kirsch II, *Problems in Domestic Violence: Should Victims be Forced to Participate in the Prosecution of their Abusers?*, 7 Wm. & Mary J. Women & L. 383, 394 (2001) (quoting a prosecutor who said "I had one case where the woman came in [seeking] to drop [the case] and had a hand written note from the defendant that said something like, 'My court dates are July 1 and 15. Go to the prosecutor and tell them that you want the case dismissed. They'll dismiss it.'"); *See* App. 53a, Letter 8 ("defendant had a friend come to his house the day of court and 'baby-sit' the victim to make sure she didn't come to court for the trial"); App. 50a-51a, Letter 6; App. 42a, Letter 1. Batterers—already intimately familiar with the vulnerabilities of their victims—are skilled at honing in on pressure points.[14] One attorney described this scenario:

> '[If] the defendant knows that the woman has the capability of dropping the charge, he's going to beat her, he's gonna make her eat the restraining order . . . he'll make her crawl on the ground and eat cigarettes[,] and

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[14] As discussed in Section II.A., *supra*, because the victim is intimately connected to the abuser, often depending on him for financial support, or sharing a home and/or children, the abuser has infinitely greater leverage over the victim than the more typical criminal defendant.

> every other kind of abuse you can imagine as long as she has the potential to drop it, that's going to happen.'

Report of the Florida Supreme Court Gender Bias Study Commission (Mar. 1990), *reprinted in* 42 Fla. L. Rev. 803, 861 (1991) (alterations in original) (citations omitted). Far too often, such tactics are rewarded. As a former prosecutor stated, "[w]hen a batterer and his defense attorney know that a victim's failure to cooperate may result in case dismissal, they control the judicial process." Hanna, *supra*, at 1891; *see* App. 56a, Letter 10 (victim threatened and "[a]s a result . . . did not appear and her case . . . was terminated.").

In sum, a broad interpretation of the Confrontation Clause greatly reduces the State's ability to go forward without victims' testimony. This will play directly into batterers' hands by exacerbating the very problem evidence-based prosecution was designed to avoid: coercion of victims by defendants, leading to a recanting of victim testimony or refusal to cooperate with prosecutors and dismissal of the charges.

C. The Doctrine of Forfeiture Does Not Adequately Solve the Problems a Broad Definition of "Testimonial" Poses for Domestic Violence Cases.

In *Crawford*, this Court stated that the doctrine of "forfeiture by wrongdoing" continues to apply where appropriate. 541 U.S. at 62 (citing *Reynolds v. United States*, 98 U.S. 145, 158-59 (1870)). The forfeiture doctrine embodies the principle that "[t]he Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts." *Reynolds*, 98 U.S. at 158. While *Amici* believe that forfeiture should apply

broadly to many domestic violence cases,[15] there is good reason to believe that it will often be insufficient to address the problems described above.

Forfeiture claims in domestic violence cases could arise in at least three different circumstances: (i) where the defendant engages in post-charge coercion or interference with the intent of precluding or changing the victim's testimony; (ii) where the defendant engages in post-charge abuse or intimidation but his intent is not explicit; and (iii) where the defendant does not have further contact with the victim post-charge but the victim is too traumatized, frightened or otherwise ambivalent to testify.

While forfeiture claims have been comparatively rare in domestic violence cases until now (as prior to *Crawford* the doctrine was infrequently needed), there are numerous potential obstacles to application of forfeiture.[16] Cases such as (i) above presumably present the strongest cases for forfeiture. Nonetheless, even where the defendant has threatened or re-assaulted the victim with the intent to prevent her testimony, establishing the defendant's wrongdoing is likely to be difficult if not impossible. Victims who fear participating in a prosecution are unlikely to inform the prosecutors about new episodes of abuse and even less likely

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[15] Indeed, if contrary to Respondents' and *Amici*'s urgings, this Court should decide to reverse the decisions below, *Amici* would respectfully suggest that, instead of an outright reversal, the Court remand the cases for forfeiture hearings, while providing sufficient guidance as to the broad application of the doctrine to ensure that the problems described above are avoided.

[16] Notably, neither the Petitioners nor their supporting *amici* even address forfeiture in their briefs—even when arguing that domestic violence prosecutions can still go forward--implying that they will oppose broad application of the doctrine.

to appear for a forfeiture hearing.[17] Thus, where proof of the defendant's wrongdoing depends solely on the victim's in-court testimony (*i.e.*, where neither hearsay evidence nor other witnesses are available), the testimony will be unavailable and a forfeiture argument will fail.[18]

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[17] While the majority of courts have held that forfeiture hearings, as pretrial evidentiary determinations, require the State to meet only a preponderance of the evidence standard, several courts have held that defendants' rights to confrontation are too important to be resolved in that way and have adopted a clear and convincing standard. *See, e.g., United States v. Houlihan*, 887 F. Supp. 352 (D. Mass. 1995); *United States v. Smith*, 792 F.2d 441, 442 (4th Cir. 1986) (affirming on other grounds); *People v. Geraci*, 649 N.E.2d 817 (N.Y. 1995) (adopting clear and convincing due to importance of confrontation right). *See also United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982) (describing Supreme Court precedents as mixed on this point but adopting preponderance standard); *State v. Jarzbek*, 529 A.2d 1245, 1255 (Conn. 1987) (requiring clear and convincing evidence of need to videotape child's testimony). This Court has held a preponderance standard applies for suppression hearings regarding possible misconduct by the police, *Lego v. Twomey*, 404 U.S. 477, 489 (1972) (voluntariness of confession); *United States v. Matlock*, 415 U.S. 164, 178 (1974) (consent to search); but has held otherwise for a question involving a constitutional right relating to the reliability of evidence, *United States v. Wade*, 388 U.S. 218, 240 (1967) (requiring clear and convincing proof that in-court identification of suspect was not tainted by unconstitutional lineup). Of course, where the problem is a reluctant or terrified witness, meeting a clear and convincing standard of proof as to the reasons for her absence may be quite difficult.

[18] Moreover, proof of interference in the domestic violence context can be quite subtle. "'Battered women . . . may perceive danger and imminence differently from men . . . A subtle gesture or a new method of abuse, insignificant to another person, may create a reasonable fear in a battered woman.'" *People v. Romero*, 13 Cal. Rptr. 2d 332, 338 (Cal. Ct. App. 1992) (citation omitted). *See also* Lynn Hecht Schafran, *Why Empirical Data Must Inform Practice, in Violence Against Women: Law and Litigation* 1-58 (Frazee, Noel & Brenneke eds., 1997) (sending roses may be a message of intimidation to a victim who has made clear she wants no contact). Batterers do not need to engage in overt conduct to

The second scenario above (where defendant engages in intimidation but does not clearly express an intent to dissuade victim from testifying) poses the question of the extent to which an intent to interfere with testimony must be proven. The Federal Rule of Evidence regarding forfeiture and most state analogues expressly require proof of intent. *See* Fed. R. Evid. 804(b)(6) (requiring that the party has "engaged or acquiesced in wrongdoing that was *intended* to, and did, procure the unavailability of the declarant as a witness") (emphasis added). *See United States v. Gray*, 405 F.3d 227, 242 & n.9 (4th Cir.) (emphasizing intent requirement), *cert. denied*, 126 S. Ct. 275 (2005); *United States v. Dhinsa*, 243 F.3d 635, 653 (2d Cir. 2001) (reciting language of Rule 804(b)(6)); *People v. Melchor*, No. 1-03-3036, 2005 Ill. App. LEXIS 1123, at *40 (Ill. App. Ct. Nov. 14, 2005) (finding that a majority of the states require intent or motivation). Such an intent requirement may preclude application of forfeiture in many domestic violence cases, where abuse, harassment, or even sweet-talking causes a victim to recant or withdraw, but the defendant's intent to interfere with her testimony cannot be proven. *But cf. United States v. Garcia-Meza*, 403 F.3d 364, 370 (6th Cir. 2005) (holding that although Rule 804(b)(6) may require intent, the Sixth

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exert power over their victims. *See, e.g.*, App. 71a, Letter 23 (just seeing her abuser made the victim "shak[e] uncontrollably"); App. 56a, Letter 9 ("every time she sees her boyfriend, or even a photo, she relives both the rape and the battering"); App. 68a, Letter 20 ("While a true weapon such as a knife, or a gun may be used as part of the package, the look, the voice, or the words of the abuser serve as just as much a fear stimulator."). There is no assurance that a court will recognize that conduct that may appear innocuous to the outside eye was responsible for a victim's disappearance.

Amendment does not); *Gonzalez v. State*, 155 S.W.3d 603, 611 (Tex. Ct. App. 2004).[19]

Finally, category (iii) above represents the many domestic violence cases where there is no evidence of post-arrest interference with a witness, but the victim is unwilling or unable to testify because of the history of abuse—that history makes testifying in front of the defendant too terrifying or traumatizing. *See* pp. 12-13, *supra*. *See e.g.*, App. 63a, Letter 18; App. 63a, Letter 19. In such cases it is unlikely that the requirement that defendant's wrongdoing must be intended to prevent the witness from testifying, could be met.[20]

Few courts have addressed this precise issue, but at least one has noted that a "mere" history of domestic violence may be insufficient to merit forfeiture. *United States v. Montague*,

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[19] A related question is whether the prosecution may rely on the wrongdoing that constitutes the basis for the criminal charge, to show wrongdoing for purposes of a forfeiture claim. Many courts have held in homicide cases, that it may. *See, e.g., Garcia-Meza*, 403 F.3d at 370; *Gray*, 405 F.3d at 243. However, at least one court has held otherwise. *United States v. Mikos*, No. 02 CR 137-1, 2004 U.S. Dist. LEXIS 13650, at *16 (N.D. Ill. July 16, 2004) (describing reliance on evidence related to charge to prove wrongdoing pretrial, a "slippery slope" which opens a "very real possibility of someday substantially eroding the defendant's right to be presumed innocent"). This too will be an issue in domestic violence cases, where the prior history of abuse is often not known to the prosecution.

[20] It is not uncommon for domestic abusers to threaten their victims that they will kill them if they call the police, etc., *see* App. 39a, Letter 1, and such pre-arrest threats might well be considered in a forfeiture hearing. However, in many cases, especially if the victim is avoiding the prosecution, the prosecutors may not have information about these specific past threats. Moreover, a strict construction of the intent requirement described above would preclude consideration of pre-arrest conduct which by definition could not be aimed at interfering with these particular charges.

421 F.3d 1099, 1104 (10th Cir. 2005) (stating that "evidence of [the defendant's] pre-prosecution conduct [alone] may be insufficient to warrant application of the wrongdoing/forfeiture exception" but upholding relevance of past relationship to wrongdoing determination). *See also* Myrna Raeder, *Remember the Ladies and the Children Too*: Crawford's *Impact on Domestic Violence and Child Abuse Cases*, 71 Brook. L. Rev. 311, 361 (2005) ("forfeiture cannot be assumed without specific evidence linking a defendant to a complainant's failure to testify at trial"). *But cf. People v. Santiago*, No. 2725-02, 2003 N.Y. Misc. LEXIS 829, at **45, 52 (N.Y. Sup. Ct. Apr. 7, 2003) ("it is hard to conceive that [forfeiture] should be limited to situations in which the misconduct occurred between the date of the charge and the date of the trial"); Adam M. Krischer, *"Though Justice May Be Blind, It is Not Stupid": Applying Common Sense to Crawford v. Washington in Domestic Violence Cases*, 1 The Voice 1, 3 (Nov. 2004), *available at* http://www.ndaa-apri.org/pdf/the_voice_vol_1_issue_1.pdf (arguing that the right to confrontation should be waived if the victim "is so traumatized or so threatened by the defendant that she refuses to cooperate from the start of the investigation" such that "the defendant has no need to commit any act to secure the victim's unavailability outside of the charged conduct itself").

The forfeiture doctrine, while in principle applicable, in practice may be incapable of adequately remedying the inherent pressures against victims' testimony in many domestic violence cases.

D. A Broad Interpretation of "Testimonial" Will Compel Prosecutors to Sanction Victims.

In addition to subjecting victims to increased pressure and coercion from batterers, increased reliance on victims' testimony may intensify prosecutors' use of coercive and

punitive measures to force victims to cooperate. Prosecutors generally make every effort to obtain the assistance of the victim-witness in domestic violence cases. While committed prosecutors must utilize evidence-based prosecution in order to effectively address domestic violence, no good prosecutor seeks to prosecute without the victim's testimony. *See, e.g.*, App. 78a, Letter 31 ("I had a meeting with the D.A. and it was explained to me that I did not have to testify however it would make the case much stronger if I did."); App. 35a, WCADV Statement of Interest (local prosecutors won't bring case "if the victim won't testify, even if there is strong evidence that a crime was committed"). In fact, even before *Crawford*, prosecutors all too often have considered victim participation so essential as to justify using coercive or punitive measures to ensure testimony. Gwinn & O'Dell, *supra*, at 313 (prosecutors' attempts to deal with victims who do not appear in court have "resulted in significant numbers of victims being arrested and incarcerated while their abusers have avoided jail time altogether"); *see* John Riley, *Spouse-Abuse Victim Jailed After No-Drop Policy Invoked*, Nat'l L.J., Aug. 22, 1983, at 4 (battered woman who refused to testify against her husband under Anchorage, Alaska's no-drop policy was jailed overnight for her refusal to cooperate with the prosecution);[21] App. 61a, Letter 15; App. 62a, Letter 17.

Recently in Kansas, an alleged rape victim spent three nights in jail because she refused to testify against her attacker. *See Alleged Rape Victim Refuses to Testify, Spends Three Nights in Jail*, Topeka Metro News, Feb. 23, 2005, at 1. When one advocate told the state's attorney that her client

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[21] *See also* Hanna, *supra*, at 1910 ("A victim who wants to drop charges in Alexandria, Virginia must appear on the day that trial is scheduled to discuss the case with the prosecuting attorney. Victims are advised that if they do not appear, a judge may assess court costs against them.").

did not wish to testify, the prosecutor told the victim that she could be subpoenaed and if she did not show up at trial she could be arrested. *See* App. 61a, Letter 15. Another advocate reports that several counties in California issue warrants for victims who refuse to testify. *See* App. 62a, Letter 17. Victims of domestic violence in Nassau County, New York are threatened with arrest or sanctions if they are unwilling to testify. *See* App. 21a, Nassau County Coalition Against Domestic Violence Statement of Interest. There, the District Attorney issues subpoenas and warrants for their arrest if victims fail to appear, even for an interview. *See also* Robert Tharp, *supra*, at 1A. These tactics have not escaped judicial notice. *E.g.*, *Fowler v. Indiana*, 809 N.E.2d 960, 965 (Ind. Ct. App. 2004) (expressing concern with officer's threats to compel testimony and cautioning against placing victims "in the situation of being intimidated not only by the aggressor, but also by the State"), *vacated*, 829 N.E.2d 459, 462 (Ind. 2005).

Battered women, already terrorized by their abusers, should not be forced to endure additional threats or punishment from the prosecutor to whom they turn in their search for safety. A broad interpretation of "testimonial" statements that results in mandated victim participation will too often compel prosecutors to this result, leading to the re-victimization of the victims by the very system designed to protect them.

IV. A NARROW INTERPRETATION OF "TESTIMONIAL" IS CONSISTENT WITH THE FRAMERS' INTENT.

The *Crawford* Court acknowledged that a historical reading of the Confrontation Clause would preclude, at the least, admission of "formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," *Crawford*, 541 U.S. at 51, and modern police "interrogations." *Id.* A narrow definition of "interrogation,"

limited to the "colloquial" understanding of a coercive, formal, and structured environment, *cf.* Brief of *Amicus Curiae* National District Attorneys Association in Support of Respondents at 22-23, is fully consistent with the original intent of the Clause, and is necessary to ensure that it is not expanded in ways that will undermine its original purpose.

As explained in *Crawford*, the Framers' concern was with the unfair use of the State's power against relatively powerless defendants. *Id.* at 56 n.7 (focusing on "prosecutorial abuse"). Specifically, the Framers sought to address the State's practice of denying defendants their right to cross-examination, by enshrining that right in the Confrontation Clause. Yet in cases such as those before the Court, defendants do not actually seek to cross-examine the victims; if they did, they would be free to use their right of Compulsory Process to compel the victims' testimony. U.S. Const. amend. VI.

In these cases, the problem is not an abuse of power by the State, because the State has long *refused* to prosecute domestic violence, has only erratically treated it as a crime, and has only reluctantly come to devote significant efforts to rectifying it. Rather, the problem is a defendant who seeks to *prevent the witness from testifying* and a State that seeks to bring her to court. The absence of a live witness in this situation is not something for which the State should be penalized.

Petitioners' extremely broad reading of the Confrontation right would suppress the truth-seeking mission of the adversary process. *See Taylor*, 484 U.S. at 410-11 (neither side intended to exercise control over the other in the truth-seeking process). It would place the State's ability to prosecute a scourge that occupies a substantial portion of today's criminal justice dockets almost entirely at the whim of defendants (or the extraordinary bravery of their victims). The history and language of the Confrontation Clause support

instead a moderate application which maintains the "the closest possible fit" between the Clause and its original purpose and scope. *Cf. United States v. Patane*, 542 U.S. 630, 641 (2004) (limiting expansion of *Miranda* rule).

CONCLUSION

For the foregoing reasons, the judgments in *Davis* (05-5224) and *Hammon* (05-5705) should be AFFIRMED.

Respectfully submitted,

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APPENDIX A

INTEREST OF *AMICI CURIAE*

The following organizations respectfully submit this brief as *Amici Curiae* in support of the Respondents, and urge the Court to affirm the decisions of the Supreme Court of Indiana and the Supreme Court of Washington.

The **National Network to End Domestic Violence (NNEDV)** is a not-for-profit organization incorporated in the District of Columbia in 1995 (www.nnedv.org). The mission of NNEDV is to create a social, political and economic environment in which violence against women no longer exists. A network of state domestic violence coalitions, representing over 2,000 member programs nationally, NNEDV serves as the voice of battered women and their children and those who provide direct services to them. NNEDV has a long history of working at the state, local and national level to promote a strong criminal justice response to domestic violence. NNEDV works with states and local communities to implement best practices in the prosecution of domestic violence cases. NNEDV member organizations provide training for law enforcement officers and prosecutors about domestic violence and the needs of victims. NNEDV member organizations have been involved in the reform of state laws addressing domestic violence for more than two decades. Along with local, state and national leaders in domestic violence and criminal justice issues, NNEDV continues to formulate new approaches and innovative legal solutions to ending domestic violence. NNEDV was instrumental to Congressional enactment and eventual implementation of the Violence Against Women Acts of 1994, 2000 and 2005.

The **National Network to End Domestic Violence Fund (NNEDV Fund)** is a not-for-profit organization

incorporated in the District of Columbia in 1996 for the purposes of providing technical assistance, training and public education to advocates, professionals and individuals who encountered battered women in their work and communities. NNEDV Fund has provided advice and expertise on domestic violence issues affecting battered women and their children to judges, attorneys, educators and state and local welfare, justice system personnel, and others working to end domestic violence. NNEDV Fund provides technical assistance to states as they work with police, judges and prosecutors to enforce protection orders. NNEDV Fund also collaborates with state and national domestic violence, law enforcement and other criminal justice organizations to provide training, outreach and standards for protection orders. NNEDV Fund is the leading national voice on the criminal justice response to victims of domestic violence.

The **Indiana Coalition Against Domestic Violence (ICADV)** is committed to the elimination of domestic violence through: providing public awareness and education; advocating for systemic and societal change; influencing public policy and allocation of resources; educating and strengthening coalition members; and, promoting the availability of comprehensive services.

ICADV believes that violence is endemic to our society. We believe patriarchal values and attitudes support and perpetuate violence and we seek to confront the roots of that violence within ourselves and within larger economic, social and political systems. We believe that no human being deserves to be beaten or violated by another. We believe in the right of all persons to live without fear, oppression, or sexual, emotional or physical abuse. We believe domestic violence is the use of force or threat to achieve and maintain control over others in personal relationships. *Evidence based prosecutions are critical in analyzing the legal issues absent the interpersonal relationship of the parties. If the victim*

must participate to successfully pursue criminal prosecution against the alleged batterer, then that batterer has the ability to influence the very prosecution itself. We believe batterers should be held accountable for their actions. We believe in inclusiveness and respect for diversity. Our goal is to empower individuals to achieve self-determination. We are committed to the ideas and practices of a supportive, non-competitive atmosphere in ICADV, which fosters open communications, respect and cooperation among all members of the coalition. We believe the elimination of domestic violence is best achieved by utilizing a multi-faceted approach, *including the use of evidence based prosecution.* We believe that while the majority of victims of domestic violence are women and children, everyone is affected by it and the solution involves everyone.

The **Washington State Coalition Against Domestic Violence (WSCADV)** is a non-profit organization, incorporated in the state of Washington. Founded in 1990 by domestic violence survivors, WSCADV is a statewide membership organization that organized to share resources, develop common strategies and strengthen community responses to domestic violence in Washington State. WSCADV's core commitment of the WSCADV is to support domestic violence survivors, and emergency shelter and advocacy programs by advocating for laws and public policies that promote safety and justice for domestic violence victims.

WSCADV conducts statewide trainings for law enforcement officers and prosecutors about domestic violence and the needs of victims, and assists local communities to implement best practices in the investigation and prosecution of domestic violence cases.

Legal Momentum advances the rights of women and girls by using the power of the law and creating innovative

public policy. Legal Momentum is dedicated to working to end violence against women. Legal Momentum was one of the lead advocates for the landmark Violence Against Women Act and its reauthorizations, which seek to redress the historical inadequacy of the justice system's response to domestic violence. Legal Momentum also represents victims of domestic violence who suffer housing and employment discrimination related to the violence. Legal Momentum is concerned that adoption of a broad definition of "testimonial" would foreclose the possibility of evidence-based prosecution and thus ensure that violent criminals go unpunished and victims are without protection of the law.

The **Domestic Violence Legal Empowerment and Appeals Project (DV LEAP)** is a national non-profit organization dedicated to filling a vacuum in legal advocacy for battered women and children by providing expert *pro bono* representation in domestic violence appeals. DV LEAP is a partnership of the National Network to End Domestic Violence, George Washington University Law School, and a network of participating law firms, and is directed by one of the nation's leading domestic violence advocates.

The **Alabama Coalition Against Domestic Violence (ACADV)** is a nongovernmental, nonprofit organization that speaks on behalf of all Alabama domestic violence shelters and has been a leader in education, policy reform and advocacy. ACADV also operates a 24-hour statewide hotline for domestic violence. ACADV has a long history of collaboration at the state and local level. Staff and member programs work in partnership with the Alabama Legislature to pass laws that protect victims of domestic violence and hold perpetrators accountable. ACADV provides training and technical assistance to thousands of professionals around the state to promote an effective criminal justice response to domestic violence.

The **Arizona Coalition Against Domestic Violence (AzCADV)** is a not-for-profit organization incorporated in 1980 (azcadv.org). The mission of AzCADV is to lead, to advocate, to educate, to collaborate, to end domestic violence in Arizona. AzCADV is a coalition of 129 members who are domestic violence service providers, individuals, students, task forces and survivors. As a long term advocate for domestic violence victims in Arizona, the Coalition collaborates with state, local and national efforts to promote a strong criminal justice response to domestic violence. AzCADV works with states and local communities to implement best practices in the prosecution of domestic violence cases. The Coalition also works with the Arizona Peace Officer Standards and Training Board to provide training for law enforcement officers and prosecutors about domestic violence and the needs of victims. AzCADV and its member organizations have been involved in the reform of state laws addressing domestic violence for more than two decades. Along with local, state and national leaders in domestic violence and criminal justice issues, AzCADV continues to formulate new approaches and innovative legal solutions to ending domestic violence. AzCADV and its members were instrumental to Congressional enactment and eventual implementation of the Violence Against Women Acts of 1994, 2000 and 2005.

The mission of **Break the Cycle** is to engage, educate and empower youth to build lives and communities free from dating and domestic violence. Founded in 1996, Break the Cycle is the nation's first organization to provide law-based domestic violence services exclusively to young people, ages 12 to 24. Our domestic violence prevention and early intervention services include education and outreach, peer leadership opportunities and comprehensive, free legal services for young victims of abuse. Break the Cycle works on both a national and local level to provide youth with resources they need to end domestic violence. Since our

inception, Break the Cycle has directly served more than 65,000 youth across the nation.

Our 10 years of experience working with abused youth throughout the country guide our support of this brief. Girls and women between the ages of 16 and 24 are the most vulnerable to domestic violence, experiencing the highest per capita rates of non-fatal intimate partner violence. According to these statistics, Break the Cycle deals with the most threatened or all female domestic violence victims. For this reason, we are in a unique position to understand the significant importance of evidence-based prosecution in domestic violence cases.

There are several obstacles unique to the 12 to 24 age group that greatly increases the difficulty of seeking prosecution in domestic violence cases. On occasion, there are situations where abusers victimize our clients sexually and physically. Often there are children born into these relationships and it may not be in the victim's best interest to prosecute the case. If the client is a woman, she may be in danger from the abuser and/or his friends and his family. A number of our clients have abusers who are even gang members and the client's safety is greatly threatened by testifying against the abuser. If prosecution could go forward without the victim being involved, it would decrease the pressure on victims to testify and would assist prosecutors with cases that they might otherwise not be able to prosecute.

The **California Partnership to End Domestic Violence (CPEDV)** is the federally recognized statewide domestic violence coalition for California. Its members include approximately one hundred domestic violence service organizations, supportive organizations, survivors of domestic violence, and other concerned individuals. CPEDV works to end domestic violence through public education, partner-

ships, advocacy, public policy, and direct services and is member driven.

CPEDV was formed in 2005 out of a merger of two former entities, the California Alliance Against Domestic Violence (CAADV) and the Statewide California Coalition for Battered Women (SCCBW). CAADV has filed several amicus briefs with the California Supreme Court. These included a brief filed in *People v. Cornell Brown*, 33 Cal.4th 892 (Cal. 2004), in which the issue on appeal was the admissibility of expert witness testimony where the alleged victim of domestic violence partially recanted at trial.

In December 2005, CPEDV filed an amicus brief in *People v. Giles*, to be heard in the California Supreme Court in 2006. This case deals with the admissibility of a statement by a victim of a domestic violence homicide made to police on a previous occasion and implicating the defendant. The defendant argued on appeal that the admission of this statement violated his Sixth Amendment right to confrontation. However, the appellate court ruled that it was admissible under the rule of forfeiture, which Justice Scalia stated in Crawford is an exception to the right of confrontation. CPEDV's brief emphasized the deleterious effect on domestic violence prosecutions which would ensue if courts were not allowed to admit such statements when victims are not available to testify, through intimidation or death.

The **Colorado Coalition Against Domestic Violence (CCADV)** is a statewide membership organization. CCADV was established in 1978 by twelve domestic violence service providers in order to provide a strong statewide voice for survivors of domestic violence, their families, and providers of service. As the statewide voice for survivors, CCADV represents over 80 domestic violence shelters, resource centers, allied organizations and individuals. Through commu-

nity education, networking and the empowerment of battered women and children, CCADV provides a system of comprehensive services that support member programs' ability to effectively serve diverse survivors of domestic violence (over 40,000 individuals each year). One of the central goals of CCADV is to enhance criminal justice response to domestic violence in Colorado. Recognizing that many victims of domestic violence do not access the criminal justice system for fear of retaliation, CCADV supports practices that facilitate offender accountability while maintaining victim safety. Since domestic violence victims are most vulnerable to an assault when they attempt to leave or sever the relationship with the defendant, victims may refuse to testify in court against their abusers. In these instances, CCADV recognizes the importance of evidence-based prosecution to ensure that offenders can be held accountable even without a domestic violence victim's in-court testimony.

CORA (Community Overcoming Relationship Abuse) is a nonprofit organization directed at ending domestic violence/abuse in San Mateo County, California (www.corasupport.org). CORA provides free and confidential services to victims and survivors of domestic/dating violence and abuse. Our services include a 24-hour hotline, support groups, legal services, emergency and transitional housing, and more, in English, Spanish and Tagalog. CORA is a multicultural agency committed to serving victims/survivors of domestic violence/abuse, regardless of age, ethnicity/race, financial status, language, sexual orientation, immigration status, class, religion, gender, mental or physical ability..

The **Connecticut Coalition Against Domestic Violence, Inc. (CCADV)** was founded in 1978 as the "Battered Women's Task Force" and incorporated in 1986, as a vehicle for community-based domestic violence shelter programs to provide statewide public policy advocacy,

legislative reform, and education on the issue of domestic violence. CCADV is a membership organization whose purpose is to work together to end domestic violence by changing the social conditions, beliefs and social actions that perpetuate abuse against women and children. There are eighteen domestic violence shelter programs in Connecticut and all are members in good standing of CCADV. Over the years as the needs of battered women and their children have changed, the eighteen domestic violence shelter programs have expanded the types of advocacy and services offered to meet these changing needs. The Coalition's focus is to provide training, education and technical assistance to its member programs in order to ensure quality and consistent services throughout the State of Connecticut.

CCADV was a member of the 1986 Governor's Task Force on Family Violence and the 1997 Task Force to Study the Issue of Domestic Violence, which was created pursuant to Public Act 96-245. In 1986, CCADV successfully worked to ensure passage of Connecticut's Family Violence Prevention and Response Act (FVPRA), still considered one of the most comprehensive family violence statutes in the country.

The **Delaware Coalition Against Domestic Violence** is a statewide non profit organization, incorporated in the State of Delaware in 1994 (www.dcadv.org), comprised of domestic violence agencies, allied organizations and supportive individuals. The mission of DCADV is to eliminate domestic violence through: acting as an educational and informational resource to our member agencies and the community; advocating for domestic violence concerns in Delaware and providing a strong, unified statewide voice for victims of domestic violence and their children, domestic violence programs, and victim service providers.

For the past twelve years, DCADV has worked at both the state and local levels to help ensure that the policies and practices of Delaware's civil and criminal justice systems serve the interests of battered women and their children. Through our work with domestic violence shelter and advocacy programs, and our Survivors Task Force, we serve as a voice for both survivors of domestic violence and the programs that serve them. DCADV provides training and technical support to the Delaware Department of Justice as well as local and state law enforcement agencies and participates on numerous committees and task forces that identify and, hopefully resolve problems within our social and legal institutions. Much work has been done to encourage prosecutors and law enforcement officers in our state to take domestic violence seriously and to respect the rights of battered women who may be afraid to testify against their abusers and to carefully collect evidence that will enable the Court to prosecute domestic violence cases, even if the victim is not able to participate. These efforts are informed by both research on best practices and the knowledge and expertise of other state coalition and national organizations such as the National Network to End Domestic Violence. DCADV is also actively involved in reforming state and local laws to better address the needs and protect the rights of battered women who live and/or work in Delaware. Moreover, DCADV continues to work in partnership with state and national leaders to help formulate new approaches and innovative legal solutions to ending domestic violence.

The **District of Columbia Coalition Against Domestic Violence (DCCADV)** is a not-for-profit organization incorporated in the District of Columbia in 1986 (www.dccadv.org). The mission of the DCCADV is two-fold: 1) to eradicate all types of relationship violence including: domestic violence, spousal rape, sexual assault, stalking, mental and emotional abuse, and acquaintance rape through the coordinated mobilization of efforts to effect systemic

social change; and 2) to build a city wide response in the District and surrounding jurisdictions in partnership with the community, providers, and concerned others to more effectively ensure the safety, security, and justice needs of those living with violence and abuse. DCCADV pursues these goals through its focus on advocacy, public education, public policy, technical assistance and training, resources, research and direct services. The DCCADV serves as the voice of battered women and their children and those who provide direct services to them. DCCADV has a long history of working at state and local levels to promote a strong criminal justice response to domestic violence. DCCADV works with the community to implement best practices in the prosecution of domestic violence cases. DCCADV provides training for law enforcement officers and prosecutors about domestic violence and the needs of victims. DCCADV has been involved in the reform of local laws addressing domestic violence for more than a decade. Along with governmental agencies and not for profit direct service providers in domestic violence and criminal justice issues, DCCADV continues to formulate new approaches and innovative legal solutions to ending domestic violence.

Therefore, DCCADV understands and advocates for evidence-based prosecution in domestic violence cases and is committed to joining the amicus brief(s) prepared by the National Network to End Domestic Violence addressing this issue.

The **Florida Coalition Against Domestic Violence (FCADV)** is the statewide nonprofit advocacy and public policy organization for Florida's 41 certified domestic violence centers which provide shelter and other services to domestic violence, dating violence, sexual violence and stalking victims in Florida's 67 counties. In 1977, 14 shelters in Florida formed a network of battered women's advocates known as the Refuge Information Network. Several years

later this organization was incorporated as FCADV. This organization was founded on principles of cooperation and unity among shelters. FCADV's mission is to create a violence-free world by empowering women and children through the elimination of personal and institutional violence and oppression against all people. FCADV provides leadership, advocacy, education, training, technical assistance, public policy and development, and support to domestic violence center programs.

The **Georgetown University Law Center Domestic Violence Clinic** is a clinical legal education program in which law students have represented victims of domestic violence in civil protection order cases since 1983. Each year, the Clinic provides legal representation to approximately 60 clients in the D.C. Superior Court, and provides legal counseling to another 100 local victims of family abuse. In addition, until September, 2000, the Clinic administered the Emergency Domestic Relations Project, which provided a wide range of legal services to more than 50,000 low-income, unrepresented victims of domestic violence over the past 21 years. Project personnel train local attorneys in domestic violence law, refer indigent victims to them for pro bono representation, and mentor them through their first cases.

The **Georgia Coalition Against Domestic Violence** is a non-profit organization representing domestic violence programs and individual battered and formerly battered women. The mission of the Georgia Coalition Against Domestic Violence (GCADV) is to support its member programs to achieve safety and justice for domestic violence victims. GCADV is a coalition of domestic violence programs from around the state of Georgia. GCADV has extensive expertise on the physical, emotional and economic dangers domestic violence victims and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors,

and the media in providing a more effective net of protection for battered women. We provide training and technical assistance to our member programs, the police, courts and legislators.

We have seen first-hand the effects of low prosecution rates on the escalation of battering behavior. We have worked with many victims who are unable to follow through with the extensive and prohibitive prosecution process due to safety concerns, interference with job security (which impacts economic stability), and the emotional trauma of prosecuting their current or former partners. Yet we are clear that prosecuting batterers is currently the only control the system has to deescalate a batterer's violence. Without evidence based prosecution, many batterers will continue their violence with current and/or future partners.

Hawaii State Coalition Against Domestic Violence (HSCADV), a private, not-for-profit, statewide coalition, was formed in 1980. It is comprised of the majority of the directors of the spouse abuse shelters and counseling programs for victims and perpetrators of partner abuse on each of the islands, as well as the Victim Witness Assistance Division of the Honolulu Prosecutor's Office, the Domestic Violence Clearinghouse and Legal Hotline, the Legal Aid Society of Hawaii, and Na Loio Immigrant Rights and Legal Center. The HSCADV currently has twenty-five agency/ program members.

The HSCADV conducts activities to promote domestic violence intervention and prevention and to increase public awareness of domestic violence issues. The purpose of the Coalition is to coordinate efforts to end family violence in Hawaii. The HSCADV provides: coordination of services, community education and training on family violence, planning and technical assistance on family violence matters to domestic violence programs and agencies, and facilitation

upon request. The HSCADV also collects resource materials and serves as a clearinghouse for domestic violence information and resource materials. The HSCADV collaborates with other coalitions, groups and individuals from both the private and public sectors on a variety of projects.

The **Idaho Coalition Against Sexual & Domestic Violence** is a not-for-profit organization incorporated in Idaho in 1980. The mission of the Idaho Coalition Against Sexual & Domestic Violence is to provide education, assistance, and support to individuals, programs, and organizations dedicated to ending sexual assault and domestic violence. A network of state domestic violence and sexual assault victim services programs, law enforcement, prosecutors, and other service providers, the Idaho Coalition serves as the statewide voice of victims of sexual assault, dating violence, domestic violence and stalking. Victims of domestic violence in Idaho who testify against the alleged abuser in criminal court are subject to increased danger, coercion, and trauma. Victimless prosecutions have taken place in order to protect the safety of the victims. Curtailing victimless prosecutions would endanger Idaho's ability to prosecute domestic violence, thereby further endangering a population already greatly at risk.

The **Illinois Coalition Against Domestic Violence (ICADV)** is a non-profit organization, incorporated in the State of Illinois. Founded in 1978, ICADV is a statewide membership organization of local domestic violence programs and individuals committed to ending domestic violence. The mission of the ICADV is to eliminate domestic violence by changing societal attitudes, practices and policies about women from diverse groups, their children and violence through education, advocacy and social action. To that end member programs provides services annually to over 50,000 adults and children.

The ICADV is the only statewide organization in Illinois that provides training and technical assistance on domestic violence issues for battered women's advocates, other professionals and community lay people. ICADV actively promotes public policy to protect victims of domestic violence and their children and to hold perpetrators accountable for their violent behavior. ICADV participates actively in training law enforcement officers, probation officers, prosecutors, lawyers and the judiciary on Illinois statutes and federal statutes regarding violence against women and children. ICADV encourages prosecution of domestic assaults as a means to decrease domestic violence homicides. However, prosecution is difficult because victims are afraid of the perpetrators and perpetrators commonly threaten the victim with retaliation for any cooperation they give to the court. ICADV promotes collection of evidence and prosecution wherever possible using witnesses other than the victim.

The **Iowa Coalition Against Domestic Violence (ICADV)** is a non-profit organization, incorporated in the state of Iowa in 1985. ICADV provides educational and technical assistance to the domestic violence programs across Iowa, and also acts on a statewide and national level to promote public policy and legislative issues on behalf of battered women and their children. ICADV's purpose is to eliminate personal and institutional violence against women through support to programs providing safety and services to battered women and their children. ICADV recognizes that unequal power contributes to violence against women. Therefore, ICADV advocates social change, legal and judicial reform, and the end to all oppression.

Jane Doe Inc. (JDI) is the Massachusetts Coalition Against Sexual Assault and Domestic Violence. JDI is a statewide membership organization of over 60 domestic violence programs and rape crisis centers. The mission of

JDI is to bring together organizations and people committed to ending domestic violence and sexual assault. We advocate for responsive public policy, raise awareness, and provide technical assistance and support to our member organizations who provide comprehensive prevention and intervention services. In keeping with its mission, JDI has an interest in removing barriers that limit or deny a domestic violence survivor's access to justice and support services. Over the last twenty-eight years we have worked with police and prosecutors to use reliable hearsay exceptions as a best practice in the prosecution of domestic violence cases. This practice has resulted in a substantial increase in the numbers of victims and their children who were further protected from harm.

The **Kansas Coalition Against Sexual and Domestic Violence (KCSDV)** is a non-profit organization representing domestic violence and sexual assault programs and individual battered and formerly battered women and victims of sexual violence. KCSDV has extensive expertise on the physical, emotional and economic dangers women and their families face when they challenge their batterers and perpetrators in a court of law. This organization and its member programs work closely with courts, legislators, law enforcement agencies, prosecutors, and the media across the state to provide a more effective network that will protect battered women and sexual assault victims seeking help through a court proceeding.

The **Kentucky Domestic Violence Association (KDVA)** is a non-profit organization that provides training, technical assistance and support services to Kentucky's sixteen domestic violence shelter programs. These programs help thousands of victims of domestic violence and their children each year through shelter, education, counseling, casework and advocacy. The mission of KDVA is to ensure that the right to live free of any form of domestic abuse is

valued, protected and defended in the Commonwealth of Kentucky. Given the real complexities victims of domestic violence must face while attempting to survive and/or exit a domestic violence relationship, and given the critical need for perpetrators of domestic violence to be held accountable for their actions, KDVA recognizes the importance of evidence-based prosecutions in domestic violence cases.

The **Legal Aid Society of Northwest North Carolina, Inc. (LAS)** is a not-for-profit organization incorporated in North Carolina. We were incorporated in 1962 and are the oldest civil legal services agency in North Carolina. The mission of LAS is to provide equal access to the civil justice system for low income people in our six county service area. In 1996, in collaboration with many community partners, the Legal Aid Society began our Domestic Violence Advocacy Center to improve the representation of victims of domestic violence in civil protective order hearings in Forsyth County. In 2002 we expanded DVAC to provide services to all six counties in our service area including Forsyth, Surry, Stoke, Davie Yadkin and Iredell Counties. As a part of our work to end domestic violence in the lives of our clients, and in our community we work very closely with our community collaborative which includes representatives from our district attorney's Office, sheriff's department, police departments, Family Services, Inc. health care providers, our local Department of Social Services among others. We also work with statewide collaborative to improve the social and legal responses to domestic violence in our state.

The **Maine Coalition to End Domestic Violence (MCEDV)** is a not-for-profit organization incorporated in the state of Maine in 1977 (www.mcedv.org). The mission of MCEDV is to create a social, political and economic environment in which violence against women no longer exists. A coalition of the nine Maine domestic violence

organizations, MCEDV serves as the statewide voice of battered women and their children and those who provide direct services to them. MCEDV has a long history of working at the state and local level to promote a strong criminal justice response to domestic violence. MCEDV works with state agencies and local communities to implement best practices in the prosecution of domestic violence cases. MCEDV and its member organizations provide training for law enforcement officers and prosecutors about domestic violence and the needs of victims. MCEDV and its member organizations have been involved in the reform of state laws addressing domestic violence for more than two decades. Along with local, state and national leaders in domestic violence and criminal justice issues, MCEDV continues to formulate new approaches and innovative legal solutions to ending domestic violence.

The **Maryland Network Against Domestic Violence (MNADV)** has been working since 1980 to eliminate domestic violence in Maryland through *education, training, and advocacy.* As Maryland's state coalition, the Network works together with local domestic violence programs as well as criminal justice and law enforcement personnel, legal advocates, health care and social service providers, clergy, educators, businesses, community groups, and concerned individuals to *promote a coordinated community response to end domestic violence.* MNADV provides a statewide helpline, website, numerous publications; offers professional training and information to a broad range of service providers on a variety of topics through conferences and specialized workshops; develops model policies, protocols, and standards; provides legislative, public policy and systems advocacy; collaborates with local, state, and national organizations; sponsors an annual awards dinner, Memorial Service, and public education activities.

The **Michigan Coalition Against Domestic and Sexual Violence (MCADSV)** is a not-for-profit organization incorporated in the State of Michigan for the purpose of providing services and advocacy on behalf of the victims of sexual assault and domestic violence and their minor children. MCADSV is a membership organization of over 50 domestic violence and sexual assault service provider agencies, as well as other supportive agencies and individuals, committed to ending domestic and sexual violence. For over twenty-five years, MCADSV has provided training, technical assistance and policy consultation to victim services programs, the bar, the courts, law enforcement agencies, governmental bodies and others on the issue of domestic violence and sexual assault.

The **Minnesota Coalition for Battered Women, Inc. (MCBW)** is a private, non-profit membership organization which serves as a statewide coalition with approximately one hundred local, regional and statewide grassroots organizations which provide shelter and services to battered women and their families. MCBW provides training and technical assistance for member programs, networking and support for battered women and community education to law enforcement, schools and the general public. The member organizations of MCBW, with consultation and assistance provided by the Coalition, provide shelter and lay advocacy every year to thousands of battered women. MCBW, both directly and in collaboration with member programs, works with law enforcement and prosecutors to provide safety for battered women and their children.

Missouri Coalition Against Domestic Violence (MCADV), is a non-profit membership organization, incorporated in 1980, of 91 Missouri programs that provide services to those who have been victimized by domestic violence. MCADV has extensive expertise addressing the physical, emotional, and economic dangers survivors and

their families experience in courts of law when seeking safety and protection, as well as accountability, from their abusers. MCADV works closely with courts, legislators, law enforcement, prosecuting attorneys, and a wide variety of community service programs and institutions to provide education, public policy, and adequate and reasonable procedures to achieve effective protections for abused people.

MCADV is extremely concerned about the case of *Hammon* v. *Indiana* because the Court's decision will have significant implications for cases involving domestic and sexual violence in Missouri and throughout the nation. Victims of domestic and sexual violence may have legitimate concerns regarding their safety that preclude them from testifying in criminal cases brought to trial. Thus, the use of evidence-based prosecution, including the presentation of reliable hearsay, is necessary to hold the assailants accountable for their criminal behavior. A key component of evidence-based prosecution includes the ability to present statements made as excited utterances. This exception to the hearsay rule has long been recognized by the courts as a reliable form of evidence. A statement made contemporaneously with, or immediately after, a startling event provides a high degree of reliability. When jurors do not receive sufficient information about the case, juries may not hold the perpetrators accountable for their crimes. The elimination of the use of reliable hearsay evidence would result in tragic miscarriages of justice.

The **Montana Coalition Against Domestic and Sexual Violence (Montana Coalition)** is a non-profit organization representing domestic violence programs and individual battered and formerly battered women. The Montana Coaliton has extensive experience on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law.

The **Nassau County Coalition Against Domestic Violence** in Nassau County, New York, provides comprehensive services that focus on the safety and well being of victims of domestic violence, and sexual assault. We also work to ensure societal accountability, improve institutional responsiveness to victims, and increase public awareness in order to prevent domestic violence, and sexual assault. Victims of domestic violence in Nassau County, New York were being threatened with arrest or sanctions if they indicated that they were unwilling to testify against their abuser. The DA's office often penalized them for their unwillingness to testify by issuing subpoenas and warrants for their arrest if they failed to appear, even for an interview with the Assistant District Attorney. When these victims were clients of our agency, we would intervene with the DA's office on their behalf, but regretfully, all too often the victim (even our clients) did not realize that we were a resource to intercede on their behalf.

The **Nebraska Domestic Violence Sexual Assault Coalition (NDVSAC)** is a non-profit statewide organization representing Nebraska's 22 domestic violence programs and individual battered and formerly battered women.

NDVSAC has extensive expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the civil and criminal justice systems, and the media in providing a more effective net of protection for battered women who ask for help. NDVSAC works with state and local prosecutors to promote a strong criminal justice response to domestic violence and to implement best practices in the prosecution of domestic violence cases, particularly when battered women are unable to take the stand to testify against abusers. NDVSAC and its member organizations provide training for

law enforcement officers and prosecutors about domestic violence and the needs of victims.

The **Nevada Network Against Domestic Violence (NNADV)** is a not-for-profit organization founded in 1980, and incorporated in the State of Nevada, to help Nevada's communities respond creatively and effectively to the needs of victims of domestic violence (www.nnadv.org). As a statewide organization, NNADV provides a resource library and technical assistance to communities and advocates. NNADV coordinates quarterly network meetings, assists in the provision of rural community education, and is active in educating legislators on issues of concern to Nevada families. In an effort to promote social change and empower women and all persons affected by domestic violence, NNADV is an inclusive network which supports member programs, communities and individuals to work on the elimination of domestic violence and the core issues of societal oppression. NNADV has a long history of working at state and local levels to promote a strong criminal justice response to domestic violence. NNADV has been working with local communities to implement best practices in the prosecution of domestic violence cases. We know, through testimony to the Nevada State Legislature, that prosecutors rely to a very great extent on the existence of 911 tapes or excited utterances when they decide whether to move forward with a domestic violence prosecution. If these types of evidence become inadmissible in court because they are "testimonial," NNADV believes that this would have detrimental impact on the prosecution of domestic violence cases in Nevada.

The **New Hampshire Coalition Against Domestic and Sexual Violence ("Coalition")** is a statewide network of fourteen independent member programs committed to ending domestic and sexual violence. Founded in 1977, the Coalition continues to ensure that high-quality services are provided to victims/survivors of domestic violence, sexual

abuse and stalking. Because the Coalition recognizes that violence and oppression are connected, we promote social change by empowering victims and by holding systems accountable for their responses to domestic and sexual violence and stalking.

Our member programs have a great deal of experience providing services to victims who cannot or choose not to testify against their abusers. The victim's reluctance stems from numerous factors including: legitimate fear of retribution, ambiguous feelings about pursuing criminal charges against their partner, and lack of information about alternative economic assistance to replace financial support from their partners. We believe that accountability for abusive partners is key to ending family violence. Therefore, NHCADSV supports evidence based prosecution and asks to have our comments added to the record.

The **New Jersey Coalition for Battered Women (NJCBW)** is a statewide coalition of domestic violence service programs and concerned individuals whose purpose and mission is to end violence in the lives of women. Incorporated in 1979, NJCBW is a private, non-profit corporation whose members include 29 domestic violence programs in New Jersey. NJCBW advocates for battered women with state level governmental and private agencies, the state legislature, judiciary and governor to support legislation and policies that will increase the safety and options of victims of domestic violence. It also provides information, resources, technical assistance and training to domestic violence programs, the public and those agencies, organizations and individuals involved with New Jersey's response to domestic violence.

NJCBW acknowledges the critical importance of evidenced based prosecution in domestic violence cases. NJCBW has many years of experience dealing with domestic violence victims who are reluctant or unable to testify in a

legal matter. The concept of evidence based prosecution grew out of the need to hold batterers accountable without a domestic violence victim's testimony or cooperation and sends a strong message that domestic violence is a serious crime against society.

The **New Mexico Coalition Against Domestic Violence (NMCADV)** is a non-profit organization representing domestic violence programs and individually battered and formerly battered women. NMCADV has expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law.

The **New York State Coalition Against Domestic Violence (Coalition)** is a not-for-profit membership organization whose mission is to eradicate domestic violence and to ensure the provision of effective and appropriate services to victims of domestic violence through community outreach, education, training, technical assistance and policy development. The Coalition's principles and practices prioritize the safety and concerns of women who are abused, provide support and encouragement for the participation of women who are abused in the struggle to eradicate personal and institutional violence against them, and provide for a non-competitive atmosphere that fosters open communication, respect and cooperation among advocates and women who are abused. The Coalition submits this Statement of Interest because we believe in the importance of evidence-based prosecution in domestic violence cases.

The **North Carolina Coalition Against Domestic Violence (NCCADV)** is a statewide non-profit membership organization providing support services to local domestic violence agencies and allied professionals. The mission of NCCADV is to create social change through the elimination of the institutional, cultural, and individual oppressions that contribute to domestic violence. Approximately ninety

domestic violence programs provide direct services to victims of domestic violence in all 100 counties in NC. Domestic violence crisis lines in NC received over 94,000 calls in FY 2003, and local domestic violence programs served over 45,000 victims in FY 2003. In addition, from January 1, 2002, through December 31, 2005, 295 women, children, and men have been murdered in NC as a result of domestic violence, according to information collected by our Coalition. North Carolina ranks 16th in the nation for the number of per capita homicides committed by men against women in 2003, according to the Violence Policy Center study released in September 2005. NCCADV works closely with allied professionals within the criminal justice system to enhance accountability of abusers and increase safety for victims. We provide training to law enforcement, prosecutors, magistrates, clerks and other court personnel on a statewide and local level. We are very concerned about the impact that the Court's decision in *Crawford* has had on the successful prosecution of domestic violence cases in our state. If perpetrators of domestic violence are not held accountable for their crimes, domestic violence will continue to be an epidemic in our state, and women, children, and men will continue to be murdered as a result.

The **North Dakota Council on Abused Women's Services/Coalition Against Sexual Assault in North Dakota (NDCAWS/CASAND)** is a not-for-profit organization incorporated in North Dakota since 1980. The mission of NDCAWS/CASAND is to provide leadership by facilitating local, state, and regional collaboration in the identification and prevention of domestic and sexual assault. As a network of community based domestic violence providers, NDCAWS/CASAND serves as the voice of battered women and their children and those who provide direct services to them in North Dakota. NDCAWS/CASAND has a long history of working at the state and local level to promote strong criminal justice response to domestic

violence. NDCAWS/CASAND works with providers in all 53 North Dakota counties to implement best practices in prosecution of domestic violence cases. We provide training for law enforcement officers, judges and prosecutors about domestic violence and the needs of victims. Our member organizations have been involved in helping to craft state laws addressing domestic violence since 1980. Our organization continues to work on new approaches and innovative legal solutions to ending domestic violence and sexual assault in North Dakota.

The **Ohio Domestic Violence Network (ODVN)** is a not-for-profit membership organization incorporated in the state of Ohio and is comprised of 78 domestic violence programs and 213 allied professionals representing batterers' intervention programs and other legal and social service agencies that provide services and advocacy to victims and perpetrators of domestic violence. The member agencies represent all regions of the state, including rural and urban areas. ODVN advances the principle that all people have the right to an oppression and violence free life; fosters changes in our economic, social and political system and brings leadership, expertise and best practices to community programs. ODVN seeks individual, legislative and social change, produces and shares information, and educates the public and other agencies about domestic violence and resource options. As Ohio's largest and most comprehensive resource on domestic violence, ODVN represents the interests of and works arm in arm with domestic violence agencies and victims throughout Ohio. ODVN is a member of the National Network to End Domestic Violence.

ODVN works closely with state agencies and local communities to implement best practices in the prosecution of domestic violence cases. ODVN recently revised the Ohio Model Protocol for Responding to Domestic Violence. The Model Protocol encourages prosecutors to develop procedures to evaluate domestic violence cases from a perspective

that is victim sensitive without being victim driven. Prosecutors are also encouraged to prosecute without the availability of the victim by using evidence gathered at the scene, police reports, medical and other witnesses. ODVN also provides training for law enforcement officers, prosecutors and court personnel on the dynamics of domestic violence. ODVN and its members have been involved in the reform of state laws including enactment of the preferred arrest law in 1994 and statutory bail consideration for alleged domestic violence offenders in 2005. ODVN will continue to work towards the development of strategies designed to prevent domestic violence.

The **Oklahoma Coalition Against Domestic Violence and Sexual Assault (OCADVSA)** is a not-for-profit organization incorporated in the state of Oklahoma in 1981. The purposes of OCADVSA are the elimination of domestic and sexual violence in Oklahoma; to ensure the safety of victims of domestic and sexual violence and stalking; and to hold perpetrators of the crimes of domestic violence, sexual assault and stalking accountable for their crimes. This is accomplished by creating a social and political atmosphere in which these crimes will no longer occur.

OCADVSA is the membership organization of domestic violence and sexual assault service providers that includes twenty-eight state certified and tribal victim service organizations. OCADVSA has a long and successful history of working at the state, local and national levels to promote a strong criminal justice response to domestic violence and sexual assault. OCADVSA works with allied state and local level agencies and organizations to implement the best practices in the prosecution of domestic violence and sexual assault cases. OCADVSA provides training and education for law enforcement, prosecutors and the judiciary about domestic violence and sexual assault and the needs of victims. OCADVSA has consistently been involved in the

reform of state and national laws addressing the crimes of domestic and sexual violence. OCADVSA worked with national leaders such as the National Network to End Domestic Violence and the National Coalition Against Domestic Violence in the enactment and implementation of the Violence Against Women Acts of 1994, 2000 and 2005.

For five years OCADVSA has collaborated with the Oklahoma Attorney General, the Oklahoma District Attorneys Council, the Oklahoma Regional Policing Institute and the Spirits of Hope Native American Coalition to host the Annual Violence Against Women Conference and the annual regional trainings in 4 sites across the state to address the importance and techniques of evidence based prosecution.

The **Oregon Coalition Against Domestic and Sexual Violence (OCADSV)** is a not-for-profit organization incorporated in the state of Oregon in 1978. Our mission is to support organizations that assist victims of domestic and sexual violence; provide training assistance to staff and organizations engaged in crisis intervention, shelter, and public education of domestic and sexual violence; explore and support innovative approaches to prevention of and responses to domestic and sexual violence; and to change societal conditions that cause domestic and sexual violence to exist. OCADSV is also involved in promoting legislation designed to protect and to empower women survivors of domestic and sexual violence and to develop public policy that ensures an effective statewide system to address and respond to violence against women. Our staff is active on many state and governmental committees and councils confronting the issue of domestic violence and sexual assault including the Governor's Council on Domestic Violence, STOP Violence Against Women Advisory Board, Oregon Department of Human Services: Children, Adults and Families, and the State Family Law Advisory Committee—domestic violence subcommittee.

The **Pennsylvania Coalition Against Domestic Violence, Inc. (PCADV)** is a not-for-profit organization incorporated in the Commonwealth of Pennsylvania for the purpose of proving services and advocacy on behalf of victims of domestic violence and their minor children. PCADV is a membership organization of 62 shelters, hotlines, counseling programs, safe home networks, legal advocacy projects, and transitional housing projects for battered women and their dependent children in the Commonwealth. For thirty years, PCADV has provided training and technical assistance to domestic violence programs, attorneys, the courts, and law enforcement agencies on issues of domestic violence.

PCADV is deeply concerned about the safety of victims of domestic violence and knows that battering is extremely dangerous and can be lethal. At the same time, it can also be lethal for a victim to testify against the perpetrator of the violence. The evolution and success of the victimless prosecution model has protected many victims, who cannot or will not testify, from the inherent dangers of participating in the criminal prosecution of the offender. It provides a highly effective means of prosecution that holds the offender accountable and protects the victim from further danger, coercion and trauma.

PCADV joins in the brief of amicus curiae to assist the Court in its consideration of the scope of the *Crawford* decision and the ability of prosecutors to introduce victims' statements at trial by finding they are non-testimonial, admissible evidence.

The **Rhode Island Coalition Against Domestic Violence ("Coalition")** is a not-for-profit organization incorporated in the State of Rhode Island in 1979 to assist and support Rhode Island's six shelter programs for victims of domestic abuse. The Coalition has taken the lead in policy and program development on behalf of battered women for

the past twenty-one years. The Coalition has been active in implementing the provisions of the Violence Against Women Act in Rhode Island, and in national advocacy activities relating to the Act. The Coalition serves as a resource for the six member agencies, providing training, technical assistance, statewide planning and needs assessment research, and dissemination of resources. As an organization dedicated to safety and justice for domestic violence victims, we know that evidence-based prosecution is critical to an effective criminal justice response to domestic violence.

The **South Carolina Coalition Against Domestic Violence and Sexual Assault (SCCADVASA)** is a not-for-profit organization incorporated in the state of South Carolina in 1981. The mission of SCCADVASA is to lead the state in its efforts to prevent and eradicate interpersonal violence. SCCADVASA represents the 23 non-profit organizations throughout South Carolina offering a myriad of services to victims of domestic and sexual violence in both federal and state legislative efforts. In addition, for the last 25 years, SCCADVASA has been instrumental in setting standards of service for all its member organizations and has established collaborative efforts with state agencies, other non-profit organizations and business and industry leaders to educate and inform the general public in regard to the issues of domestic violence and sexual assault and to engage the entire state in efforts to prevent and respond to these crimes. Along with these partners, SCCADVASA continues to formulate new approaches and innovative legal solutions to ending domestic and sexual violence and to ensuring a high quality of services to victims of both domestic and sexual violence.

Stop Family Violence (SFV), a national grassroots activist organization founded in 2000, is a project of the Tides Center, a not-for-profit organization incorporated in 1995 in San Francisco, CA. Stop Family Violence's mission is to organize and amplify our nation's collective voice to end

family violence. Our 30,000 members are victims/survivors of domestic violence, sexual assault, stalking, child abuse, child sexual abuse, and elder abuse as well as service providers, allied professionals and concerned members of the general public. Stop Family Violence invites its members to take action at the local, state and national level to effect policy change that will ensure safety, justice, accountability and healing for victims of all forms of family violence.

The **Tennessee Coalition Against Domestic and Sexual Violence (TCADSV)** is a non-profit organization composed of diverse community leaders and program members who share a common vision of ending violence against women and children through public policy advocacy, education, and activities which increase the capacity of programs and communities to address violence. Our services include: technical assistance, training, curriculum and resource development, public policy advocacy, newsletter publication, networking opportunities, resource library, speaker's bureau and a toll-free information line. As a statewide coalition, we serve domestic violence and sexual assault programs, community groups and organizations, criminal justice agencies, victim service agencies, allied professionals and individuals seeking information and resources.

The **Utah Domestic Violence Council (UDVC)** is a not-for-profit organization incorporated in Utah in 1998. The mission of UDVC is to lead a collaborative, statewide effort to eliminate domestic violence. UDVC consists of 36 voting members from across the state who represent licensed domestic violence shelters, victim advocate programs, law enforcement, Utah Office of the Attorney General, Utah Division of Child and Family Services, Utah Prosecution Council, Utah Legal Services, Utah Legal Aid Society, Utah Department of Corrections, courts, licensed treatment providers and survivors of domestic violence. Committees

including Public Awareness, Training, Justice and Interfaith Leaders invite community members to participate in the success of our mission, to incorporate best practices in Utah's response to domestic violence and educate the public about domestic violence and the needs of victims. Through training, education and development of public policy, UDVC works to bring together a coordinated response. A statewide, toll free domestic violence information and referral line provides direct response to victims, services providers, family, and others. In addition, UDVC works with 21 local domestic violence coalitions throughout the state recognizing that through prompt availability and accessibility of domestic violence services delivered in a manner that preserves human dignity, and overcomes cultural, linguistic and economic barriers Utah will reduce domestic violence.

The **Vermont Network Against Domestic and Sexual Violence (the "Vermont Network")** is a non-profit organization representing 16 domestic and sexual violence programs in the state of Vermont. Each of our domestic violence programs is considered experts in their community on the physical, emotional and economic dangers women and their families face when attempting separation from their batterers. The Vermont Network as a whole is comprised of decades of experience and expertise regarding how the court system responds to women and children who are battered.

As a coalition, we work closely with our Programs offering support and information so that they can better serve victims of domestic and/or sexual violence. We know that the theory/process of victimless prosecution has created a safer way for victim/survivors to be involved in the criminal justice system. We have a history of working closely with law enforcement, both at the state and local level, and have found them extremely supportive of this technique which allows more success in holding batterers accountable for their actions. Should victims of domestic abuse be forced to testify

against their intimate partner/abuser, the level of accountability for batterers will decrease markedly reinforcing a message of acceptance and tolerance for violence in our society.

The **Virginia Sexual and Domestic Violence Action Alliance (VSDVAA)**, the non-profit state domestic and sexual violence coalition in Virginia, was incorporated in the Commonwealth of Virginia in 2004 after the merger of Virginians Aligned Against Sexual Assault (VAASA, incorporated 1980) and Virginians Against Domestic Violence (VADV, incorporated 1981). VSDVAA is a coalition of individuals, agencies and organizations committed to the elimination of sexual and domestic violence. VSDVAA is a diverse group of individuals and organizations that believe that ALL people have the right to a life free of violence. VSDVAA recognizes that sexual and domestic violence are linked to other forms of oppression, which disproportionately affect women, children and other marginalized people, harming individuals, families and societies as a whole. VSDVAA will use its diverse and collective voice to create a Virginia free from sexual and domestic violence—inspiring others to join and support values of equality, respect and shared power.

VSDVAA supports the use of civil and criminal remedies to 'hold domestic violence perpetrators accountable, and to protect victims of domestic violence. One such remedy is the use of evidence-based prosecution that protects the victim by not asking her to testify against her batterer.

Professor D. Kelly Weisberg, Hastings College of Law, University of California, San Francisco, is a nationally recognized scholar in the areas of Family Law, and Children and the Law. She has participated in federally-funded studies of family violence. Her current scholarship highlights civil and criminal responses to domestic violence, the reform of state laws addressing these issues, and the negative impact of

the *Crawford* ruling on the prosecution of domestic violence cases.

The **West Virginia Coalition Against Domestic Violence (WVCADV)** is a membership, statewide non-profit organization committed to ending personal and institutional violence in the lives of women, children and men. WVCADV member programs provide safe space and direct services for victims of domestic violence; the Coalition Statewide Office coordinates a strong network of shared resources that support policy analysis and social change work. These efforts provide statewide systems and local communities viable options needed in responding meaningfully to the needs of victims of domestic violence. In 1988, WVCADV established a Coalition Statewide Office (CSO) to work in the areas of public policy, legislative advocacy, resource development, public information, the development of statewide training programs, and collection and storage of domestic violence data. WVCADV is composed of fourteen licensed domestic violence programs that provide direct services to victims of domestic violence and a coalition statewide office that coordinates public education, training opportunities, and technical assistance to the domestic violence programs, allied organizations, and the general public. WVCADV's Board of Directors is comprised of representatives of each of the licensed programs. The licensed domestic violence programs provide services to all fifty-five counties in West Virginia.

WVCADV works closely with the courts in maximizing victim safety and holding perpetrators accountable for criminal behavior. For many victims testifying in court is too traumatic or dangerous to even consider. The victim may fear, and stalkers and abusers may have threatened, further harm to the victim or other family members if the victim testifies. Rape victims may find the thought of reliving the rape by testifying too much to bear. Young children who

have been sexually or physically abused may be too terrified to sit still in a courtroom to confront their abuser.

Since the mid 1990's, prosecutors have used evidence-based, victimless prosecutions to combat this problem, using such things as 911 calls, police and medical reports, DNA evidence and in the case of child sexual assault victims using videotaped interviews or live video from a remote location to allow prosecution to proceed without endangering or retraumatizing the victims. These victimless, evidence-based prosecutions have been highly successful, in allowing prosecutors to hold offenders accountable while keeping victims safe.

The *Crawford* decision has had a terribly detrimental effect on the prosecution of domestic violence, sexual assault, stalking and child sexual abuse cases. In some cases, prosecutors are not bringing cases to court if the victim won't testify, even if there is strong evidence that a crime was committed. In other instances, prosecutors are threatening victims with contempt of court, or even putting victims in jail to coerce their testimony.

The Sixth Amendment of the U.S. Constitution ensures the defendant's right to confront their accuser, and no one is looking to see this right denied. However, in a murder case, the victim is clearly not available to testify, yet the case proceeds based on evidence. We hope the Court finds the right balance between victims' need for safety and the rights of the accused.

The **Wisconsin Coalition Against Domestic Violence (WCADV)** incorporated in Wisconsin in 1978 (www.wcadv.org). WCADV is a statewide membership organization of battered women, formerly battered women, domestic abuse programs and all committed to ending

domestic violence. Through partnerships and strategic collaborations and education, advocacy and social action, WCDV works to prevent and eliminate domestic violence. We transform societal attitudes, practices and policies both about violence, and about women from diverse communities and their children.

A network of state domestic violence programs, WCADV serves as the voice of battered women and their children and those who provide direct services to them. WCADV has a long history of working at the state, local and national level to promote a strong criminal justice response to domestic violence. WCADV works within Wisconsin on a statewide and local level to implement the best practices in the prosecution of domestic violence cases. WCADV staff and member organizations provide training for law enforcement officers and prosecutors about domestic violence and the needs of victims. WCADV staff participate on the Wisconsin VAWA Justice Systems Training (JST) Initiative. WCADV has been involved in the reform of state laws addressing domestic violence for more than two decades, including revisions to Wisconsin's mandatory arrest law within the past year. WCADV supported and promoted the Congressional enactment of the Violence Against Women Acts of 1994, 2000 and 2005.

Women Empowered Against Violence, Inc. (WEAVE) works closely with adult and teen survivors of relationship violence and abuse, providing an innovative range of legal, counseling, economic and educational services that lead survivors to utilize their inner and community resources, achieve safety for themselves and their children, and live empowered lives. WEAVE staff attorneys carry a caseload of the most difficult, long-term legal matters that come into our offices, devoting more than 55 hours to each case. WEAVE strives to maximize our resources to make the legal system as accessible and understandable for domestic

violence survivors as possible by providing legal consultations to survivors proceeding *pro se*, referring cases to our network of *pro bono* attorneys, and offering free legal information clinics. WEAVE also collaborates with other organizations to operate the D.C. Domestic Violence Intake Centers, public/private partnerships that provide vital front-line assistance to battered women, offering information and guidance in seeking civil or criminal legal assistance. Whether because of her history of abuse, or because she may face dangerous and even life-threatening repercussions, a domestic violence victim can be understandably reluctant to cooperate with prosecutors. Because of this inability or unwillingness to testify in court, evidence-based or "victimless" prosecutions are crucial tools for the state to protect victims and bring their abusers to justice. WEAVE believes that the complex reality of domestic violence must be taken into account in interpreting the admissibility of evidence under the Sixth Amendment.

The **Women's Advocacy Project, Inc. ("the Project")** is a statewide legal non-profit organization organized under Texas law in 1982, and based in Austin, Texas (www.women-law.org). The Project promotes access to justice for Texas women and children in need. Started in 1982 as a legal hotline, the agency has evolved as an expert on legal issues affecting survivors of domestic violence and sexual assault, and now provides a range of services that promote the use of legal protections to end violence against women.

The **Wyoming Coalition Against Domestic Violence and Sexual Assault (WCADVSA)** is a not-for-profit organization incorporated in the State of Wyoming. The WCADVSA is committed to social change, education and systems advocacy for a non-violent society, respect for individuals having control of their own lives and the rights of victims and their children. The Coalition is a network of 24

statewide DV/SA programs. These 24 programs provide direct services to victims and their families and the WCADVSA is their voice at the state and federal level. The WCADVSA has a long history of working to promote a strong criminal justice response to domestic violence. The WCADVSA works with local law enforcement and prosecutors to implement best practices in the prosecution of domestic violence cases. Our Coalition provides training for law enforcement members at the State Law Enforcement Academy and some of those officers, in turn, take national domestic violence training to share with other law enforcement personnel, member programs and prosecutors. WCADVSA has been involved in the reform of our state laws addressing domestic violence and its effective prosecution for two decades. The Coalition is the foremost leader in the state in formulating new approaches and solutions to ending domestic violence.

APPENDIX B

LETTERS CONCERNING THE IMPACT OF *CRAWFORD V. WASHINGTON* ON DOMESTIC VIOLENCE CASES

The following statements represent the experiences of prosecutors, law enforcement, victim advocates and victims. These statements have been reproduced. Original versions are on file with Counsel of Record.

I. LETTERS FROM PROSECUTORS AND LAW ENFORCEMENT

LETTER 1 FROM: PAUL DEDINSKY, ASSISTANT DISTRICT ATTORNEY & DV UNIT DIRECTOR, MILWAUKEE COUNTY DISTRICT ATTORNEY'S OFFICE, WISCONSIN

I am a domestic violence prosecutor from Milwaukee, Wisconsin, and I am encouraging the Court to rule that excited utterances are "non-testimonial" as a matter of law. Statements unencumbered by forethought are critical to prosecuting domestic abusers. In my experience, current interpretations of *Crawford v. Washington* invite criminal defendants to engage in manipulative behavior to keep their victims from testifying in court.

In a case example from Milwaukee County, Wisconsin, (State v. Lesent Lewis, case # 2004CM8881), the defendant was charged in a criminal complaint with one count of misdemeanor domestic violence battery against his wife, the named victim, on November 14, 2004. According to the victim, she was afraid for her safety because the defendant had warned her in the past that: "if she ever called 911 on him, he would come back and kill her."

When the victim did not appear for trial on 1-26-2005, prosecutors sought to admit her excited utterance hearsay statement that she provided to a police officer. The defense

objected, arguing that admission of the statement would violate his right to confrontation.

Following a hearing, the trial court ruled that a portion of the victim's statement would be admissible as an excited utterance. The case was adjourned for further proceedings. In the interim, the defense sought review by means of interlocutory appeal to the Wisconsin Court of Appeals. In challenging the trial court's decision, the defendant relied heavily on *Crawford*.

Acting upon intuition, a prosecutor contacted the police agency where the victim resided. On March 9, 2005, the police drove to the victim's home in order to check on her welfare and safety. No one was home. According to police reports, a neighbor explained that the defendant was seen that morning at the residence and regularly comes to the residence.

Police returned later that evening to the residence. After knocking at the door, lights in the residence were extinguished. For some time, no one answered the door. A small child then peered through a kitchen window at one police officer. Finally, the wife of the defendant answered the door. She allowed police to enter the residence. Police asked if she had seen the defendant, whose bail conditions included a provision that he have "no contact" with her. According to police reports, the 4-year old child then exclaimed: "My daddy's sitting in there . . . in the living room." The defendant was located sitting on a chair in the darkened front living room. For disobeying the trial court's bail order of "no contact" with the victim, the defendant was charged with bail jumping in a new criminal complaint.

Despite the defendant's arrest for bail jumping and the filing of new charges, defense attorneys still filed their appellate brief on March 10, 2005, arguing that the defendant had been

denied the opportunity to confront his accuser. Eventually, the defense dropped the interlocutory appeal.

While claiming the prosecution and the judiciary were preventing him from confronting his accuser in court, the defendant apparently saw little restriction on his ability to confront his accuser outside of a courtroom. The defendant's actions in disobeying the court's orders and then trying to fool the court – while wielding the *Crawford* decision as his sword—struck me as particularly manipulative.

The above dynamic of "power and control" is a prototypical example of a domestic abuse case. The defendant first warns his wife of the potential dire consequences of reporting his abuse to a 911 operator. Then a violent episode occurs. Then the defendant disobeys the court order to have contact with a prohibited witness. The witness fails to appear in court. Implicit within domestic abuse cases is the threat of future harm, and that is precisely why domestic abuse is referred to as a "cycle of violence."

The ongoing power that batterers have over their victims is apparent from our statistics. Each year, in Milwaukee, prosecutors review 10,000 misdemeanor and felony domestic violence charges. In 2005, forty percent (40%) of domestic violence cases were dismissed. **Ninety-six percent (96%) of those dismissals occurred because victims did not appear in court for trial.**

Although the vast majority of defendants facing domestic abuse charges in Milwaukee are released on their personal recognizance, some more serious offenders are held on cash bail in the Milwaukee County Jail. Several years ago, domestic violence unit prosecutors began to obtain actual copies of phone calls made by defendants held in the Milwaukee County Jail to their victims. This has given us the

opportunity to hear defendants threatening and manipulating their victims and the witnesses against them.

Enclosed with this statement is a DVD of a news story from the local FOX news affiliate in Milwaukee. The news story tracks four domestic violence cases. Based upon the conduct of these four offenders, different types of witness tampering charges were prosecuted. The statements of these offenders serve dually *forfeiture of wrongdoing* evidence. Unfortunately, most of the time, domestic violence defendants are not held in the jail pre-trial, and prosecutors never receive evidence of the intimidation.

The taped telephone conversations from jailed defendants are illustrative of evidence courts rarely get to hear. Violations of bail conditions are rampant. In domestic violence cases, abuse is typically not encapsulated in a singular incident or charge of criminal conduct. Domestic abuse occurs in the context of a relationship, one that can breed intimidation and manipulation from those seeking to exert power and control over those more vulnerable victims.

Before writing this letter, I reviewed the National Association of Criminal Defense Lawyers' amicus briefs, which describe to you the phenomenon of "evidence-based" or "victimless" prosecution cases. However, never do those amicus briefs explain to you why prosecutors must proceed forward with their cases in the absence of victims; many defendants are responsible for threatening or otherwise dissuading their victims from appearing in court. These defendants ensure that their accusers' statements will never be tested in the crucibles of direct or cross-examination.

It is my opinion that *Crawford* is being used as a tool to suppress excited utterances and similar firmly rooted hearsay exceptions. Once a victim is intimidated from appearing in court, the defendant is nearly always rewarded with the dismissal of his charges. This is untenable. This is a

miscarriage of justice that can only be righted by the Court's decision holding excited utterances to be non-testimonial as a matter of law. In the end, the Court needs to adopt a position that will promote victims to testify in court free from intimidation and harassment

LETTER 2 FROM: HARLAN H. F. WOOD, ASSISTANT DISTRICT ATTORNEY, CHEROKEE COUNTY JUSTICE CENTER, CANTON, GEORGIA

As an Assistant District Attorney in Canton, Georgia, I have witnessed directly the impact of the *Crawford* decision on one of my cases. The background that I am forwarding comes from the case: *State of Georgia v. Steven Tyler Miller.* This case was indicted and tried prior to the *Crawford* decision. *Crawford* issued, and my case was appealed based mostly on the *Crawford* decision.

The victim in my case did not testify. While I cannot say with certainty the reasons for her decision not to testify, I suspect it had something to do with her fear of the Defendant and with the fact that she moved to another state to live with family and escape her abuser. As a result, I relied on the Res Gestae exception to the hearsay rule at trial. The Victim's statements were allowed to be presented through the responding officer. Defendant was ultimately convicted of Count 1: Aggravated Assault (O.C.G.A. § 16-5-21), Count 2: Terroristic Threats (O.C.G.A. § 16-11-37), Count 3: Battery under the Family Violence Act (O.C.G.A. § 16-5-23.1), and Count 4: Obstruction of 911 Emergency Telephone Call (O.C.G.A. § 16-10-24.3).

The *Crawford* decision issued following a jury verdict resulting in a conviction in my case. The Court of Appeals of Georgia considered, among other things, whether the officer's statements as told him by the victim were admissible in view of *Crawford.* They determined that those statements were in fact **inadmissible**. That left them with a decision to make

about how those inadmissible statements, that were considered by the jury, affected the case. After considering everything, they concluded that without considering the inadmissible evidence, there was insufficient evidence to convict Defendant of Count 2: Terroristic Threats and Count 4: Obstruction of a 911 emergency telephone call. As such, they reversed the convictions on those two counts.

It turns out however that the Defendant testified at his trial. In doing so, the things that he stated, ultimately, according to the court of appeals, were sufficient to affirm the conviction on Counts 1, and 3. Count 1, Aggravated Assault is a felony in the State of Georgia which carries a 1-20 year sentence. Defendant was sentenced to 20 years with the first 4 to be served in custody. As of today, it is my understanding that he remains in custody.

The impact of *Crawford* on my case is that two counts for which the Defendant in the case I presented were reversed. It did not impact the sentence though in my case since the driving charge in sentencing was Count 1, Aggravated Assault. Please keep in mind though that two counts for which Defendant was convicted by a jury, were reversed. Had Defendant not testified, it is my belief that the entire case would have been reversed. Victim has two children with Defendant. She, at the time, had been together with Defendant for nearly 18 years, and had endured a life of abuse, that ultimately resulted in self-medication with alcohol. When I told her that I was not going to dismiss the case—the opposite of which she undoubtedly was used to hearing upon her request—she made herself scarce. As things stand today, the same situation would most likely result in acquittal. Post *Crawford* domestic violence defendants have absolutely no reason to testify. That certainly would have been the post *Crawford* advice Defendant Miller would have received from counsel. While the ultimate impact of *Crawford* on *State of Georgia v. Steven Tyler*

Miller is negligible from a sentencing view, the message sent is crystal clear—that is, if domestic violence victims do not testify, no conviction follows.

LETTER 3 FROM: BRANDELYN NICHOLS, VAWA PROSECUTOR/ ASSISTANT CITY ATTORNEY, KANSAS CITY, KANSAS

As a VAWA Prosecutor/ Assistant City Attorney in Kansas City, Kansas, I have had daily contact with the effect of the *Crawford v. Washington* ruling. Prosecution of domestic violence crimes rely almost solely on out-of-court statements.

I have had success in municipal court arguing that a domestic violence victim does not understand or expect that her 911 calls or excited utterances will be used as testimony in a trial against the defendant. However, if the case is appealed to the district court, my success in the prosecution of these cases is quite limited. The district court judges are hesitant to apply the hearsay exceptions prior to *Crawford* and without definitive case law, refuse to allow out of court statements in domestic violence cases after the ruling in *Crawford v. Washington*.

I do not frequently use warrants or impeachment of victims to ensure convictions. In my experience, it may lead to a successful record, but it actually harms the victims in future prosecutions. For example, if the victim of domestic violence has children who will the children, stay with while she is in jail awaiting trial, in the home with the abuser? What affect does that have on a divorce or custody case either pending or in the future?

It is imperative to have some guidance on what constitutes testimonial statements versus non-testimonial statements. I would argue a victim of a domestic violence crime, unless she is also a criminal law attorney, has no expectation that a 911

call or excited utterance to a police officer would be used as testimony against her abuser. A 911 call or excited utterance is in effect the same as a cry from the street corner for help and therefore should not be held as testimonial.

LETTER 4 FROM: PROSECUTOR, TWIN CITIES METROPOLITAN AREA, MINNESOTA

I am a prosecutor in the Twin Cities metropolitan area in Minnesota. I handled a case once involving a woman who had been "with" the father of her children for about 8 or 9 years by the time she was 24. She had known him at the age of 14, and he had a conviction at that time for depicting a minor in a sexual performance (filming a sex act with her). She had two children with him by the time she was 20 years old.

This man was in a gang and was extremely physically and mentally abusive. It was clear by the time I encountered these people that he had dominated and controlled her life since the moment she became involved with him.

The case I charged out occurred about 2 months after she had broken off the relationship—often the most dangerous time for an abused woman. He still had a key to her apartment, and had had some gang buddies watching her apartment. She had a male friend over for a visit, and suddenly three or four men (including the abuser) burst into her apartment using the key. The male friend fled, and the other men stood by as the abuser took her to a back bedroom and beat and kicked her repeatedly. He gave her multiple bruises and knocked out a front tooth, which is first degree assault in Minnesota.

The men left, and she drove herself to the emergency room. She initially protested against calling the police, but eventually (perhaps without her knowledge), the police arrived and took her statement, in which she said that the "father of her

children" had caused her injuries. She also told the medical people this description of the assailant. She didn't say his name.

As time went by, she went back to her work and life, and the abuser (contrary to court order) contacted her and her children. Meanwhile, I had charged him with several severe counts involving lengthy prison sentences, especially given his lengthy criminal history. The woman had chosen not to use advocacy services.

Not surprisingly, the defense attorney got a call from her on the eve of trial asking how she could "change her story." He ethically reported this to me, and I met with her. She said the same thing to me: how could she "change her story?" I told her I couldn't take a statement from her—only the police could do that.

So, I was stuck knowing that the likelihood that she would truthfully identify the assailant from the witness stand was unlikely, and that I really didn't have her giving his name at any point. Clearly, this woman was isolated and alone, and was rightfully very afraid of not only this abuser, but also of his gang buddies who would be free, even if the defendant went to prison.

Crawford prevented the use of her out of court statements. I had no witness to actually name the assailant (the man who was visiting her claimed not to see who entered the apartment). The end result was that I had to drastically reduce the prison term available, and also to agree to probation of all things for this repeatedly violent offender. I do not know whether he is still on probation, but even if he serves a prison term, it will be nowhere as long as the one he deserves or the term which would keep his victim and children safe.

Thus, my inability to use her statements meant that I could not level a just punishment against this gangster for his repeated abuse of the mother of his children.

LETTER 5 FROM: PROSECUTOR, LEE'S SUMMIT, MISSOURI

I am the domestic violence prosecutor in Lee's Summit, Missouri, a suburb of Kansas City. The *Crawford* opinion has had a devastating effect on my ability to prosecute these cases. As the decision filtered through the defense attorney community, attorneys began telling their clients that if the victim did not show up the case would be dropped. The abusers then put pressure on the victims; the appearance rate of victims plummeted, as did the conviction rate in domestic violence cases.

This case has set the prosecution of domestic violence cases back twenty years. I was here in the bad old days when a man would be holding the arm of his wife as she was telling the judge that she did not want to prosecute the case. Do we really want to return to that era? In any other case, such interference would be construed as witness tampering. In these cases it's considered a "relationship dynamic." If an abuse situation is so bad that the police are called in, it is no longer a "domestic" matter. It is a crime, and should be treated as such. 911 tapes, police reports, and excited utterances are used in the prosecution of other crimes—why not domestic violence?

LETTER 6 FROM: POLICE OFFICER JEREMY ROMO, ST. LOUIS COUNTY POLICE DEPARTMENT, MISSOURI

As a police officer for the last six years I have witnessed domestic violence and the devastating effects that it has on the victims, as well as, their children. Victims are forced to live in fear. They are subject to verbal and emotional abuse that makes them feel like they are no longer human. I have witnessed women brutally beaten. Unfortunately, I have also

witnessed victims lose their lives at the hands of their abuser. I patrolled the some small area for three years and over those three years I came into contact with some domestic violence victims on several occasions. I would get to know their names and the names of their children. Some of those repeat victims were unable to leave their abusive relationships for very legitimate reasons. Some had become isolated from their family and friends and had nowhere to go. Others had not been allowed to get any education or formal job training and could not support themselves and their children it they left. Some of the victims who stayed did so because their partners had told them over and over about how if they tried to leave he would hunt them down and kill them and their children because, "if I can't have you nobody will." Many nights I raced to the homes of these victims that I had grown to know and worry about for yet another domestic violence call. As I drove I hoped that this wouldn't be the night where that victim lost their life. Unfortunately, domestic violence victims often pay the ultimate price with their lives. There were several cases in the St. Louis area in 2005 where a victim left an abusive relationship and the abuser found the victim and killed her and in some cases her children.

Domestic violence perpetrators are masters of control and manipulation. They can be extremely emotionally and physically abusive one minute, but they can turn their abusive behavior off at the drop of a hat. When the police arrive the victim is often yelling, crying, and acting erratic, which is not unreasonable because of what they have been experiencing. They are looking for help, but they probably know from past experience that they may not get the help that they deserve. This absence of help could have been due to poor police response or the abusers ability to turn off his abusive behavior and convince the police that everything is fine or that the victim is the problem. Hundreds of times I have responded to a domestic violence call to find a victim who is hysterical and her partner is completely calm. It is not uncommon for the

abuser to point to the victim and state, "Look at her she is crazy". Usually if a police officer investigates further by talking to witnesses or examining the available evidence they will find that a crime did occur. The victim is understandably upset. She has taken a chance by involving the police and she knows if her abuser can convince the police that everything is fine they will leave and she will be subject to more abuse for trying to involve the law.

When I make the argument to others that abusers are controlling and manipulative, critics will ask me how I can possibly know what goes on before I arrive at a domestic violence scene? How can I support my claims that it is common for abusive men to lie to the police and abuse their partners to the point that they cannot leave the relationship without fear of further abuse or even death? What proof do I have?

On top of seeing domestic violence as a police officer I am also an instructor in a batterer intervention program. Two or three times a week another instructor and I sit in a room with several men that are mandated by the conditions of their probation or parole to complete the class. As instructors, we try to convince the men to make the choice to hold themselves accountable for their abusive behavior. We try to educate the men about violence and abuse and show them how they have used it to control their partners. For almost three years I have listened to batterers talk about their abusive behavior. We stress that we are not only interested in the behavior that convicted them, but also their post abusive behavior. As the men learn about domestic violence and begin to hold themselves accountable, a picture begins to emerge. The picture that emerges is one of a pattern of physical and emotional abuse that has been devastating to the life of the victims. Specifically, many abusers admit to

manipulating the police and court system to avoid accountability. They admit threatening their partners with taking the children, physical abuse, or even death if they testify against them and in the past their abuser has made good on his threats.

A majority of the men in the batterer programs were convicted using victimless prosecution. Victimless prosecution takes a huge burden from the victim and increases her safety. From my experience spontaneous utterances made in the heat of the moment when the incident is fresh in victims mind are honest and accurate. Spontaneous utterances are made before the victim has the opportunity to think of the consequences of speaking truthfully about how she was victimized.

It takes weeks and sometimes months for the men in the batterer program to begin to hold themselves accountable and admit their abusive behavior. Some men never hold themselves accountable. But, many of the men who complete the program tell us how they are glad they attended. These are the same men that stated they did not need to be in the program when they first started. They are also the men who, by their own admission, committed terrible acts of violence and abuse towards their partners. They feel that without the batterer program they would have continued to be abusive. Several of the men have stated that they are glad they were convicted and sent to the batterer program. Yet, these are the same men that would have never been convicted without victimless prosecution. Domestic Violence is an epidemic in our society, but the men and women who have committed themselves to help the victims are making a difference. Victimless prosecution in cases of domestic violence is an invaluable tool. It not only protects domestic violence victims, but it often leads the perpetrators to make positive changes in their lives through education and counseling.

II. LETTERS FROM VICTIM ADVOCATES

LETTER 7 FROM: KERRY HYATT BLOMQUIST, LEGAL COUNSEL, INDIANA COALITION AGAINST DOMESTIC VIOLENCE

In Marion County, Indianapolis, Indiana, and communities nationwide, the *Crawford* case has had a significant and startling effect on the prosecution of domestic violence criminal cases. Our most recent statistics from Marion County, Indianapolis, Indiana indicates that slightly over 24% of felony domestic violence cases and 27% of misdemeanor domestic violence cases are dismissed, primarily, according to prosecutors, because the victim either recants his or her testimony or fails to show up at trial.

Our obvious concern if *Hammon* is reversed is that not only will that dismissal percentage increase substantially literally overnight, but clearly many, many cases in the future will not even be appropriately investigated or filed if it appears the victim is reluctant to testify against the abuser. This effectively leaves the decision to prosecute within the control of the abuser, if the abuser knows that charges would be dropped if the victim was too intimidated or scared to testify

The outcome of this case is huge. Please do not disarm the system that holds batterers accountable. The decision to prosecute must be left in the hands of effective law enforcement and prosecutors, not left to the will of the batterer.

LETTER 8 FROM: TARA L. MUIR, LEGAL DIRECTOR, NEBRASKA DOMESTIC VIOLENCE SEXUAL ASSAULT COALITION

In Nebraska, the *Crawford* decision had a significant effect on the prosecution of domestic violence criminal cases.

Some county prosecutors were just beginning to try cases without the victim's testimony, mainly using the police report and the 911 call, with some success. Other prosecutors who have been slow to understand the dynamics of domestic violence were reluctant to go forward without a victim's testimony before the *Crawford* decision. These prosecutors used the decision as one more reason to not prosecute a case at all without the victim testifying, regardless of other witnesses or admission of the defendant.

Many reasons exist why a victim is reluctant or unwilling to testify. In one county, a prosecutor reported a case where the defendant had a friend come to his house the day of court and "baby-sit" the victim to make sure she didn't come to court for the trial. In a previous case, this same batterer threatened the victim not to show up but the prosecutor was able to get a conviction without her, using other witnesses to the offense. The batterer eventually elevated to felony charges, and the victim was able to come to court for the felony trial and the minute he saw her, he plead guilty and was sent to the pen for several years.

LETTER 9 FROM: MARY HAVILAND, ESQUIRE, CO-EXECUTIVE DIRECTOR, CONNECT, INC., NEW YORK, NEW YORK

I am a co-executive director of CONNECT, Inc., located in New York City, New York. CONNECT is dedicated to the prevention and elimination of family and gender violence and to the creation of safe families and peaceful communities. CONNECT transforms the attitudes, beliefs, and behaviors that perpetuate family and gender violence and addresses these complex issues through prevention, early intervention services, and community empowerment. The following are examples of cases from our Legal Advocacy Helpline or our program with the 25th Precinct in East Harlem.

Case 1

I have been working with this client since 5/7/05. This client is a survivor of domestic violence who is working full-time and attends a college program. Her partner was arrested on 3/20/05 for Harassment. Our client has two kids, one of whom is the son of the defendant. This client suffered beatings, harassment and threats from her abuser. She has also suffered the pain of hearing, listening and seeing her kids including the one child she has in common with the respondent being harassed and abused by the defendant.

The defendant called the client's job while an order of protection was in effect and threatened that if she did not drop the charges, he would continue to harass her and her kids. The defendant once called the client's job to tell her that "[he] has tried to kill her before, but that the next time he will not fail to do so." The respondent went to the oldest son school to harass him about where they lived because he wanted to know where my client was now living. The client's oldest son gave the defendant a false address in order for him not to continue to harass him.

I, as Legal Advocate, called the A.D.A. and inform her of what was going on. The A.D.A. obtained an order of protection for the respondent to stay away from our client's children. The A.D.A. informed me that this case was set to go to trial and the client would have to testify. When I tried to discuss this with the client, she was initially reluctant to accept my help because of the fear she felt of testifying against the respondent. The client felt that she was being betrayed by the system, and that no one was really concerned about her safety if she did testify. The client's biggest fears were that testifying against the respondent would be dangerous for her and her kids, fearing that the respondent would eventually try to hurt her and her kids even if that meant after he served time in jail.

The respondent had been arrested in 2003 and was in jail for 18 months, and when he came out he continued his abuse towards the client and her kids. The client did not go back with the respondent after he came out of jail, but that did not change the fact that he still felt he had control over the client, kids, and the client's life. I explained to the client I was here to help her. I told the client that I would do the best I can to make sure she feels safe throughout this process, and discuss her concerns with the A.D.A. I also referred our client to counseling which she has continued to receive throughout the duration of the case. The A.D.A. explained to the client that before she asked her to testify, she would call her to prepare her for court, and would find ways to make her feel safe throughout this process. I also told the client that I would try to find an escort to escort her to family court when testifying against the respondent. This case has not gone to trial yet. The respondent has refused accept plea offers by the District Attorney's Office.

Case 2

A past client of mine, during our initial intake and subsequent conversations, has vehemently conveyed to me the fears she has of facing, let alone testifying, against her boy-friend in his upcoming criminal trial. My client was brutally acquaintance raped twice (not by her boyfriend), the last time in front of her child. At that time, her boyfriend and she were separated.

However after the rape, my client reconciled with her boy-friend who beat her when she refused sex with him. He went further to question why she *could* have sex with the man who raped her and not with him, a man who claimed to *love* her. My client suffered numerous bruises and serious emotional trauma. She has since been hospitalized and undergone surgery.

One of the fears she conveyed to me was that every time she sees her boyfriend, or even a photo, she relives both the rape and battering. To my knowledge, my client has not been diagnosed with Post-Traumatic Stress Disorder (PTSD), but she exhibits common symptoms of PTSD such as flashbacks triggered by anything that brings to mind an aspect of the rape, depersonalization and amnesia. Reliving the trauma, while testifying, would be extremely difficult for my client for these reasons.

LETTER 10 FROM: COURT ADVOCACY PROGRAM, COLLECTED BY FAMILY RESCUE, INC., CHICAGO, ILLINOIS

Client was referred to our program by a Chicago police detective. The client explained that she previously filed criminal charges against her boyfriend for domestic battery, received an Order of Protection and had a warrant issued for the offender's arrest. The day before the client and offender were supposed to appear in court, the offender waited for the client outside of her home and attacked the client leaving injury. The offender threatened the client by saying if she showed in court tomorrow to proceed with the criminal case he would kill her. As a result, the client did not appear and her case along with the order of Protection was terminated. When asked why the client didn't go to court, the client stated that she was embarrassed about her injuries and believed the offender would really come for her and carry out his threats.

LETTER 11 FROM: MITHRA MERRYMAN, ESQUIRE, BOSTON COLLEGE LEGAL ASSISTANCE BUREAU, MASSACHUSETTS

Grace [not her real name] is 32 and has three children with her husband. I was connected with Grace through a special project funded by the Department of Justice and run out of Greater Boston Legal Services. The women I work with through the hospitals, as opposed to those I represent in court, are at the early stages of their process of understanding that

what they go through at home is not "normal" and that their husbands are, most likely, not going to change.

Grace's legal problem, as she identified it, was that she did not wish to testify against her husband in an upcoming criminal trial. Grace spent approximately 20 minutes explaining to me her and her husband's interactions regarding a shirt she apparently didn't launder correctly. This led to a *20* second explanation of how he punched her twice in the face because of it. She called the police and they did the right thing: they arrested her husband. Grace then explained that "the law is of no help" to her because of what happened after her husband was arrested and therefore she did not want to cooperate with the prosecution of her husband's case anymore.

This is what happened to Grace after her husband was arrested. First, her sister-in-law, who had been living with them and helping to care for the children while she was at work, was upset at Grace for calling the police and left. Since her husband was the only other person who cared for the children while she worked, she was left with no child care. Second, when she called in sick at work (because her face was swollen and bruised) her employer told her the next sick day would be her last working with him. The next day she confided what happened over the phone to the home-care worker who helps with her eight-year old mentally retarded child. While the worker was sympathetic, she called back later and abruptly cancelled the next three home-care visits. Desperate, she called her own mother for help with the children. Her mother told her that she couldn't help and that she should go back to her husband. Finally, Grace realized that without her husband's income, without child care and without a job she would be unable to pay for rent, food and all the other necessities of herself and her children. She did what any reasonable person would do under the circum-

stances: she begged her husband to come home and apologized for calling the police.

Part of my work with Grace was trying to change her conception that "the law" didn't work, to an understanding that her community and our society is what failed her. Still, her story is emblematic of the reality of many women who are mothers and wives: when they are abused in the home their responsibilities toward their children and the lack of available resources and support for them will often be determinant in whether or not they cooperate with laws that punish their abusers but don't provide the necessities of daily life.

LETTER 12 FROM: NORTH CAROLINA COALITION AGAINST DOMESTIC VIOLENCE

Evidence-based prosecution is an essential component of effective intervention in domestic violence cases so that perpetrators are held accountable and victims are protected from future violence. Domestic violence homicides are one of the most preventable crimes in that the criminal justice system often has an opportunity to intervene prior to a homicide. If perpetrators are held accountable through successful prosecution of domestic violence crimes, future violence and homicides can be prevented. Evidence-based prosecution provides the tools necessary to achieve this important goal.

When the Court handed down its decision in *Crawford v. Washington*, it set back efforts by North Carolina prosecutors to use evidence-based prosecution to secure convictions in domestic violence cases. Out-of-court statements made by domestic violence victims are often critical components of any evidence-based prosecution, and the *Crawford* decision called into question the admissibility of such statements in a criminal trial. Justice Scalia's opinion in Crawford declared

that "testimonial" statements made out of court would only be admissible if the declarant was made available to the defendant for cross-examination. However, the opinion conspicuously avoided a detailed definition of what "testimonial" meant, and as such, the lower courts have been left in turmoil as they struggle through this new and uncertain jurisprudence of "testimonial" statements.

These out-of-court statements are especially important in the evidence-based prosecution of domestic violence offenses. For a variety of reasons—economic pressure, the perceived moral and legal obligations of marriage, and fear of further physical violence, among others—the victims of domestic violence are often reluctant to appear in court and testify against their abusers. Evidence-based prosecution calls on prosecutors to collect evidence of domestic violence crimes which will allow them to prove these offenses with or without the participation of the victims. Because the out-of-court statements of domestic violence victims often play an important role in evidence-based prosecutions, the Supreme Court's decision in *Crawford* severely impeded these efforts.

It is within this uncertainty that North Carolina's prosecutors now struggle to prove domestic violence cases. The state's appellate courts have handed down a few rulings which attempt to define more precisely the parameters of the *Crawford* decision, but prosecutors and judges anxiously await further clarification from the United States Supreme Court. In the absence of clear rules, individual trial judges are making their own determinations as best they can. But without a workable and mutually agreed upon definition of "testimonial" statements, these well-intentioned efforts can result in a patchwork of inconsistent and conflicting rulings across the state.

LETTER 13 FROM: DONNA PLIER, PROGRAM DIRECTOR, GUARDIAN ANGEL COMMUNITY SERVICES, ILLINOIS

In our experience, if the Crawford decision is upheld it will eliminate the teeth from the police power of a directed arrest. Even if the officer makes an arrest on the facts he views, without a witness, there can be no prosecution.

For example, in a recent case, a woman came into the Order of Protection office seeking an OP after her husband scalded her with a pot of boiling water. She filed the OP 48 hours later, but then called to say that she wished to withdraw the complaint because of what were probably financial considerations. The OP process was explained as was the fact that we have no control over the criminal process. This woman has repeatedly attempted to convince the state attorney's office to withdraw the charges. The state declines to do so, having made felony charges. The State's Attorney is threatening to subpoena the client to court to testify. The client is threatening to claim police coercion. All believe this abuser was intentional in his efforts. If his wife is compelled to testify against him and refuses to do so, he will be released. Only through hearsay of the police and paramedics, could this case go forward.

LETTER 14 FROM SOUTHWEST VIRGINIA VICTIM ADVOCATE

Why do victims not want to testify? They are humiliated, embarrassed, intimidated, sleep deprived, paranoid and afraid. They've been told "I'll take the children." "No one will believe you." "You are stupid." They've been isolated from employment, family, friends, and church.

If she testifies, she is often verbally berated by the defense counsel, the abuser and the Judge. Her case is heard without a prosecutor, (Commonwealth's Attorney's are not required to prosecute misdemeanors). She's often told after the case is

dismissed, she doesn't need a protective order due to having a mutual injunction as part of the separation agreement. If she says she fought back or argued during the altercation, she's seen as contributing. If she gets angry while testifying, her attitude, it is hinted, may have contributed to the incident. If it is the first time an assault has made it to court, he's usually given unsupervised probation and possibly sent to the batterer's intervention program. He walks out free and she walks out with no protection to the words: "I'll take the children." "No one believed you." "You are stupid." And again, she's humiliated, and afraid.

LETTER 15 FROM: ANONYMOUS VICTIM ADVOCATE

I am a victim advocate who is working with a victim of a domestic violence rape. When I responded to the scene of this rape the victim was in nothing more than a towel. The investigation was completed, the victim was taken to the Sexual Assault Treatment Center, and an arrest was made. In this state there is a Pre-Filing Interview with a state attorney. I informed the victim of this procedure and she was very reluctant to attend because she was afraid of retaliation from the offender's family. She eventually agreed and we went to the interview along with the arresting detective. She stated in the interview that she would not testify because of her fears. The state attorney told her that if she did not testify that she could be subpoenaed and if she did not show at the trial she could be arrested. This is not the way we should treat victims. As a victim advocate I have been faced with this problem many times. I have been with my police department for 25 years and would like to understand why as an advocate for victims of violent crime I cannot speak on their behalf when there is such fear of retaliation and intimidation. I have had many other similar cases like the one stated above. I would be happy to do whatever I can so that I can have the voice that the victims fear to have.

LETTER 16 FROM: ANONYMOUS ADVOCATE

As an advocate for domestic violence and sexual assault victims in a rural community, I find that having the ability of victimless prosecution is essential in saying to perpetrators of this crime that what they did was wrong and will not be tolerated by the community. There are many reasons why a victim will not testify. One of the main reasons is fear from threats made by the abuser. If a perpetrator is able to go free because he has threatened the victim and the court dismisses the case it will just reinforce to him that his tactics work.

LETTER 17 FROM: ANONYMOUS ADVOCATE

I am our Director of Legal Projects—which means that, in addition to counseling, I do restraining orders for victims. I have seen women, when faced with the ideas of testifying, leave the area or return to their perpetrator rather than testify. Some counties in California issue warrants for victims who refuse to testify. Talk about revictimization!!!

It is important for the system to understand that these victims, and their children, have been threatened with their lives if they testify. Women are killed everyday in domestic violence situations. Please look seriously at the repercussions of forcing victims to face an abuser who has always had all the control and still wields the power.

Additionally, a big concern of victims is that so often the perpetrator is sentenced to credit for time served, stay away (from the woman), and three years summary probation. Why would a person risk their life for this? There are no safeguards. When the stay away order goes into effect it does not include the children, so the perpetrator is free to pick up the children and take off. What better way to get a woman to return? This all happens whether they testify or not. Again, why should they put theirs and their children's lives at risk.

Perpetrators are not prohibited from calling their victims when in jail. Women are then receiving calls demanding they change their story or 'pay the consequences.'

I pray this information helps to make a difference.

LETTER 18 FROM: ANONYMOUS ADVOCATE

I worked as a social worker for the Massachusetts Dept. of Social Services for nearly 15 years. I dealt with many child victims of sexual abuse and many adult victims of domestic violence during those years. None of them would have been able to testify in court without suffering further emotional trauma, and were too emotionally fragile to have that even be considered. What can anyone with common sense be thinking that this can even be something we need to debate? How can we as a society in good conscience even consider making victims re-experience their traumatic experiences in a courtroom? When will we stop putting the rights of the accused ahead of the victims? As Bob Dylan wrote many years ago, "The answer is blowing in the wind."

III. LETTERS FROM VICTIMS

LETTER 19 FROM: ANONYMOUS VICTIM

I have been trying to get divorced from my abuser for almost 3 years. After 9 years of sexual & emotional abuse to me, some violent sexual assaults, I left with my children while he was away on a business trip. I reported the most violent of the assaults to the police, my children's therapist reported their abuse to Child Protection. I could not even bring myself to talk about some of it until after about 10 months of intense therapy. There are still some aspects of my relationship with my spouse that I may never be able to talk about.

I testified in open court. During & after the court hearing, I was accused of being a vindictive, bitter wife, making the story up and that I told my children to say they were abused. When he was confronted with the fact that he had 2GB of rape and bondage porn on his computer and having an affinity for teenagers (all in open court) he admitted to liking to control his partners and to keeping me on an "allowance." He also admitted to a drinking problem and acting out his fantasies with college students. I did not understand truly till after the court hearing about circumstantial/physical evidence. It seemed to me there was enough.

So he was ordered to go to therapy with a sexual predator guru. The court system kept him away, for awhile. However, since he is the biological father of the children, he is allowed to see them, and through this relationship he continues to harass me, intimidate and revictimize me and my children.

Even today, I am court ordered through the Texas family court to go to "joint parenting" sessions with him. The rape that he did to me was bad enough, the rape by the court system is worse. The amount of pain and humiliation in talking about the manipulation, the rape and the abuse and then being reabused in the court system, told it was my fault, was about more than I could bear. I was on massive sleeping pills, suffered with PTSD—given antidepressants and anti-anxiety medication, and lived with my parents for almost a year until I was functional again.

Knowing what I know now, would I do it again? I doubt it. What was the point? Nothing changed. He can manipulate the system and has never been held accountable. But if I take my children to another country, I would be found guilty of child abduction. He has threatened to kill me, but the court system doesn't care. Yes I had a protective order for awhile. . . I guess maybe my kids and I would have justice if he kills

me, but I doubt it . . . he'd charm his way into minimum time and parole . . . he's been in therapy so he's all better, right?

LETTER 20 FROM: ANONYMOUS VICTIM

My story covers many of your points and a span of almost 20 years. I hope and pray that my story will show the court that a consideration for victims should be a part of the judicial process. My abuse began in 1988. While some incidences may have been seen as borderline, several where obvious abuse—a broken nose, cracked jaw, numerous bruises—usually around the neck. Before the births of the children that we share, born in 1991, and 1992, I withheld testifying because of his threats to me—afterward this included threats regarding the children. I was not stupid or uneducated; I came from an upper middle class home. It all started so gradually that I did not see the cocoon of helplessness and no-contact that he had enveloped me in.

I had gradually been cut off from friends and family so that I truly believed I had no one to help, and as in the case of some abusers, mine had friendships with some of the police. He left me with three young children (the 92 birth is a set of twins) but insisted that I remain faithful to him as he lived and dated several other women. As I could not afford to work and pay daycare, I was reduced to living on welfare—and he used this against me also. He stole what little money I had on many occasions, raped me and beat on several occasions.

When the police would come, he would laugh and state, "you know those welfare women", and they would laugh along with him. Even with prodding from medical staff, I almost always refused to testify—if the police wouldn't believe me who would? After the children, there was his added threat that he would follow through with social services and have the children taken from me, as on some occasions I had fought back with the abuse—I have never understood this one

either—what would the law have you do instead while someone is strangling you, throwing you up or down a flight of stairs, or slamming you in the back with a 2x4 board? Most of the more serious incidences where reduced to obstructing an officer or similar reductions that had nothing much to do with the actual crime he had committed.

Things began to change when I found an at-home study program to finish my degree. I talked with professors at the university and took exams via proctor. I made new friends and old friends and family began to renew their faith in me. My parents helped me locate to a new town, almost 200 miles away. To the avail of friends and family, it only helped somewhat—he continued to try to pursue me with threats again about the children.

The last time he beat me was in November of 1994—and I am shaking even now as I recall it. I told him "no", in no uncertain terms, "no". I would not do this anymore. Our children where at daycare, as in my new location, I had found assistance to work part-time and go to school. The "no" was met with quite a beating. He truly tried to kill me. In an instant of the madness, when I could barely walk—(at this time I had broken ribs and severe swelling and bruising around the throat)—I pretended to vomit—my abuser's weakness was a bad stomach—as he turned to face the other direction, I went for the 2nd story window as quickly as I could. I didn't make it—he caught my arms on the sill—but I screamed and yelled enough to get the attention of neighbors. It still didn't stop completely. He explained to neighbors it was just a spat and pulled me in broken and bruised and bleeding—and pulled all the phones from the plugs and made me sit next to him. He gave me the usual threats and then sat there until he knew that I had to pick up the children from daycare so that I would not go to the police or hospital. He followed me to the daycare after making me clean up as best as possible—and left from the daycare. The old me may have

listened in fear, but the new me was determined to pursue my new life without fear.

As soon as I was certain that he was well on his way home almost 200 miles away I made my way down the hallway. There I told the daycare that I was in a car accident and might they please hold my children for a bit longer so that I could get to the doctor. They only had to look at me to agree to help. After receiving medical attention, once again the police were called, and I was prepared for the usual. This town was different. This officer explained to me that he could help me simply by getting evidence of my injuries and the obvious evidence of a struggle in my home. I may still be asked to testify, he explained, but in a case such as this the evidence might speak for itself. I proceeded to press charges and the officer took pictures of my injuries and my home—for the first time. It was again humiliating and degrading but went to trial and for the first time my abuser was charged and convicted of battery.

I was subpoenaed to testify but never needed to—the evidence did speak for itself. I can't describe the feeling of how it felt, after so long, that someone believed me—and that someone had taken action so that I possibly wouldn't have to suffer anymore. I also can't explain how relieved I was that I would not have to testify. Today, even ten years later, after years of counseling to become whole again—I still have a hard time facing him in court in matters facing the children. Over ten years after my last beating it still makes me throw-up when I have to face him. I break out in a horrible, drenching cold sweat. I shake from the tips of my fingers to toes—of which I usually have to consciously place on the ground with force to stop my heals from clacking in the courtroom. Time can heal the wounds from the past but nothing can stop the fear that I have of this man. I often have to seek medical attention afterwards for migraines. No victim should have to face their antagonist. Fear—not the abuse

itself—is the major part of abuse that keeps a victim in their helpless position. This position should not be a part of the case in the court room. I am still thankful that I did not have to testify on the day that my abuser was convicted of his crime. I can't imagine the fear that I would've felt then. That fear has been used as a proficiently as any knife or gun might be used by a marksman or hunter. While a true weapon such as a knife, or gun may be used as part of the package, the look, the voice, or the words of the abuser serve as just as much a fear stimulator—and those that have been at it for a while are expert fear marksmen. Through the words of my story and others, I hope that the magnitude of that fear is realized—Thank you so much for listening to my story!

LETTER 21 FROM: ANONYMOUS VICTIM

I didn't realize I was a victim to domestic violence until I was almost killed. I lived with this man for two years and we always had confrontations, never anything physical, about the changes he wanted me to make. He would make statements that I didn't know how to be a woman, or criticize me on the way I cooked, washed clothes, cleaned house, communicate, dress, wear my hair, raise my child, everything. He would criticize my childhood, or my family as being faulty in some way. And just to let you know I am compulsive when it comes to cleaning and completing what I began. And me being set in my ways would show a stubborn side and to some degree try and change for the good of the relationship, but pretty much stay true to who I am.

Well, after the years of trying to control who I was as a person I decided to end the relationship and it took three months for him to get out of my home. But I had to give him one last moment of speaking his peace and trying to convince me that ending the relationship would be wrong. After his speach I told him to leave his key on the table and get his things.

He left his key but went to his car and brought back a 45 caliber hand gun. Forcing me in the bedroom and constantly threatening me with the weapon, I convinced him to go to the kitchen to cut off the stove. I ran to the front door and he caught me and he beat me with his fist and the weapon for approximately 15 minutes. Then I got away and ran to the balcony and jumped off from the second floor. He shot at me while I jumped off the balcony and shot me. Then he chased me through the area I lived and after shooting me twice in the left thigh and once in the right thigh, I fell, then he stood over me and shot me two more time. The gun jammed twice so that was two 45 caliber bullets that did not go into me. I was shot six times by a man that I just did not want to be with any longer.

But, what I realized was that I was in an abusive relationship for two years, after the fact. will I testify when he comes to court, yes, I'm looking forward to telling my story and him getting as much time permitted. Do I fear for my life and the life of my child, yes. I've changed my phone number about 5 times since the incident, and I've changed my address. I have anxiety attacks, and am paranoid with noises and sounds.

LETTER 22 FROM: ANONYMOUS VICTIM

I was married in May 2002; I discovered I was pregnant in August 2002. In October 2002, my husband assaulted my in my first trimester. He withheld medical care, transportation and communication to others from me. He neglected me physically, mentally, emotionally and financially. This started shortly after the pregnancy.

In the October 2002 assault, I called 911 and when offered to press charges, I declined as I asked for more time to think about it—I was in shock at the time. A couple weeks later, I decided that I should press charges and went through with it.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

DAVIS *v.* WASHINGTON

CERTIORARI TO THE SUPREME COURT OF WASHINGTON

No. 05–5224. Argued March 20, 2006—Decided June 19, 2006*

In No. 05–5224, a 911 operator ascertained from Michelle McCottry that she had been assaulted by her former boyfriend, petitioner Davis, who had just fled the scene. McCottry did not testify at Davis's trial for felony violation of a domestic no-contact order, but the court admitted the 911 recording despite Davis's objection, which he based on the Sixth Amendment's Confrontation Clause. He was convicted. The Washington Court of Appeals affirmed, as did the State Supreme Court, which concluded that, *inter alia*, the portion of the 911 conversation in which McCottry identified Davis as her assailant was not testimonial.

In No. 05–5705, when police responded to a reported domestic disturbance at the home of Amy and Hershel Hammon, Amy told them that nothing was wrong, but gave them permission to enter. Once inside, one officer kept petitioner Hershel in the kitchen while the other interviewed Amy elsewhere and had her complete and sign a battery affidavit. Amy did not appear at Hershel's bench trial for, *inter alia*, domestic battery, but her affidavit and testimony from the officer who questioned her were admitted over Hershel's objection that he had no opportunity to cross-examine her. Hershel was convicted, and the Indiana Court of Appeals affirmed in relevant part. The State Supreme Court also affirmed, concluding that, although Amy's affidavit was testimonial and wrongly admitted, it was harmless beyond a reasonable doubt.

Held:

1. The Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was un-

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*Together with No. 05–5705, *Hammon* v. *Indiana*, on certiorari to the Supreme Court of Indiana.

Syllabus

available to testify, and the defendant had a prior opportunity for cross-examination." *Crawford* v. *Washington*, 541 U. S. 36, 53–54. These cases require the Court to determine which police "interrogations" produce statements that fall within this prohibition. Without attempting to produce an exhaustive classification of all conceivable statements as either testimonial or nontestimonial, it suffices to decide the present cases to hold that statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. Pp. 6–7.

2. McCottry's statements identifying Davis as her assailant were not testimonial. Pp. 8–14.

(a) This case requires the Court to decide whether the Confrontation Clause applies only to testimonial hearsay, and, if so, whether the 911 recording qualifies. *Crawford* suggested the answer to the first question, noting that "the Confrontation Clause . . . applies to 'witnesses' against the accused—in other words, those who 'bear testimony.'" Only "testimonial statements" cause a declarant to be a witness. The Court is unaware of any early American case invoking the Confrontation Clause or the common-law right to confrontation that did not involve testimony as thus defined. Well into the 20th century, this Court's jurisprudence was carefully applied only in the testimonial context, and its later cases never in practice dispensed with the Confrontation Clause requirements of unavailability and prior cross-examination in cases involving testimonial hearsay. Pp. 8–11.

(b) The question in *Davis*, therefore, is whether, objectively considered, the interrogation during the 911 call produced testimonial statements. In contrast to *Crawford*, where the interrogation took place at a police station and was directed solely at establishing a past crime, a 911 call is ordinarily designed primarily to describe current circumstances requiring police assistance. The difference is apparent here. McCottry was speaking of events as they were actually happening, while Crawford's interrogation took place hours after the events occurred. Moreover, McCottry was facing an ongoing emergency. Further, the statements elicited were necessary to enable the police to resolve the present emergency rather than simply to learn what had happened in the past. Finally, the difference in the level of formality is striking. Crawford calmly answered questions at a station house, with an officer-interrogator taping and taking notes,

Syllabus

while McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or even safe. Thus, the circumstances of her interrogation objectively indicate that its primary purpose was to enable police assistance to meet an ongoing emergency. She was not acting as a witness or testifying. Pp. 11–14.

3. Amy Hammon's statements were testimonial. They were not much different from those in *Crawford*. It is clear from the circumstances that Amy's interrogation was part of an investigation into possibly criminal past conduct. There was no emergency in progress, she told the police when they arrived that things were fine, and the officer questioning her was seeking to determine not what was happening but what had happened. Objectively viewed, the primary, if not sole, purpose of the interrogation was to investigate a possible crime. While the formal features of Crawford's interrogation strengthened her statements' testimonial aspect, such features were not essential to the point. In both cases, the declarants were separated from the defendants, the statements recounted how potentially criminal past events began and progressed, and the interrogation took place some time after the events were over. For the same reasons the comparison to *Crawford* is compelling, the comparison to *Davis* is unpersuasive. The statements in *Davis* were taken when McCottry was alone, unprotected by police, and apparently in immediate danger from Davis. She was seeking aid, not telling a story about the past. Pp. 14–17.

4. The Indiana courts may determine on remand whether a claim of forfeiture by wrongdoing—under which one who obtains a witness's absence by wrongdoing forfeits the constitutional right to confrontation—is properly raised in *Hammon*, and, if so, whether it is meritorious. Absent such a finding, the Sixth Amendment operates to exclude Amy Hammon's affidavit. Pp. 18–19.

No. 05–5224, 154 Wash. 2d 291, 111 P. 3d 844, affirmed; No. 05–5705, 829 N. E. 2d 444, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, SOUTER, GINSBURG, BREYER, and ALITO, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment in part and dissenting in part.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 05–5224 and 05–5705

ADRIAN MARTELL DAVIS, PETITIONER

05–5224 *v.*

WASHINGTON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

HERSHEL HAMMON, PETITIONER

05–5705 *v.*

INDIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

[June 19, 2006]

JUSTICE SCALIA delivered the opinion of the Court.

These cases require us to determine when statements made to law enforcement personnel during a 911 call or at a crime scene are "testimonial" and thus subject to the requirements of the Sixth Amendment's Confrontation Clause.

I

A

The relevant statements in *Davis* v. *Washington*, No. 05–5224, were made to a 911 emergency operator on February 1, 2001. When the operator answered the initial call, the connection terminated before anyone spoke. She

reversed the call, and Michelle McCottry answered. In the ensuing conversation, the operator ascertained that McCottry was involved in a domestic disturbance with her former boyfriend Adrian Davis, the petitioner in this case:

"911 Operator: Hello.
"Complainant: Hello.
"911 Operator: What's going on?
"Complainant: He's here jumpin' on me again.
"911 Operator: Okay. Listen to me carefully. Are you in a house or an apartment?
"Complainant: I'm in a house.
"911 Operator: Are there any weapons?
"Complainant: No. He's usin' his fists.
"911 Operator: Okay. Has he been drinking?
"Complainant: No.
"911 Operator: Okay, sweetie. I've got help started. Stay on the line with me, okay?
"Complainant: I'm on the line.
"911 Operator: Listen to me carefully. Do you know his last name?
"Complainant: It's Davis.
"911 Operator: Davis? Okay, what's his first name?
"Complainant: Adran
"911 Operator: What is it?
"Complainant: Adrian.
"911 Operator: Adrian?
"Complainant: Yeah.
"911 Operator: Okay. What's his middle initial?
"Complainant: Martell. He's runnin' now." App. in No. 05–5224, pp. 8–9.

As the conversation continued, the operator learned that Davis had "just r[un] out the door" after hitting McCottry, and that he was leaving in a car with someone else. *Id.*, at 9–10. McCottry started talking, but the operator cut her off, saying, "Stop talking and answer my questions." *Id.*,

at 10. She then gathered more information about Davis (including his birthday), and learned that Davis had told McCottry that his purpose in coming to the house was "to get his stuff," since McCottry was moving. *Id.*, at 11–12. McCottry described the context of the assault, *id.*, at 12, after which the operator told her that the police were on their way. "They're gonna check the area for him first," the operator said, "and then they're gonna come talk to you." *Id.*, at 12–13.

The police arrived within four minutes of the 911 call and observed McCottry's shaken state, the "fresh injuries on her forearm and her face," and her "frantic efforts to gather her belongings and her children so that they could leave the residence." 154 Wash. 2d 291, 296, 111 P. 3d 844, 847 (2005) (en banc).

The State charged Davis with felony violation of a domestic no-contact order. "The State's only witnesses were the two police officers who responded to the 911 call. Both officers testified that McCottry exhibited injuries that appeared to be recent, but neither officer could testify as to the cause of the injuries." *Ibid.* McCottry presumably could have testified as to whether Davis was her assailant, but she did not appear. Over Davis's objection, based on the Confrontation Clause of the Sixth Amendment, the trial court admitted the recording of her exchange with the 911 operator, and the jury convicted him. The Washington Court of Appeals affirmed, 116 Wash. App. 81, 64 P. 3d 661 (2003). The Supreme Court of Washington, with one dissenting justice, also affirmed, concluding that the portion of the 911 conversation in which McCottry identified Davis was not testimonial, and that if other portions of the conversation were testimonial, admitting them was harmless beyond a reasonable doubt. 154 Wash. 2d, at 305, 111 P. 3d, at 851. We granted certiorari. 546 U. S. ___ (2005).

B

In *Hammon* v. *Indiana*, No. 05–5705, police responded late on the night of February 26, 2003, to a "reported domestic disturbance" at the home of Hershel and Amy Hammon. 829 N. E. 2d 444, 446 (Ind. 2005). They found Amy alone on the front porch, appearing "'somewhat frightened,'" but she told them that "'nothing was the matter,'" *id.*, at 446, 447. She gave them permission to enter the house, where an officer saw "a gas heating unit in the corner of the living room" that had "flames coming out of the . . . partial glass front. There were pieces of glass on the ground in front of it and there was flame emitting from the front of the heating unit." App. in No. 05–5705, p. 16.

Hershel, meanwhile, was in the kitchen. He told the police "that he and his wife had 'been in an argument' but 'everything was fine now' and the argument 'never became physical.'" 829 N. E. 2d, at 447. By this point Amy had come back inside. One of the officers remained with Hershel; the other went to the living room to talk with Amy, and "again asked [her] what had occurred." *Ibid.*; App. in No. 05–5705, at 17, 32. Hershel made several attempts to participate in Amy's conversation with the police, see *id.*, at 32, but was rebuffed. The officer later testified that Hershel "became angry when I insisted that [he] stay separated from Mrs. Hammon so that we can investigate what had happened." *Id.*, at 34. After hearing Amy's account, the officer "had her fill out and sign a battery affidavit." *Id.*, at 18. Amy handwrote the following: "Broke our Furnace & shoved me down on the floor into the broken glass. Hit me in the chest and threw me down. Broke our lamps & phone. Tore up my van where I couldn't leave the house. Attacked my daughter." *Id.*, at 2.

The State charged Hershel with domestic battery and with violating his probation. Amy was subpoenaed, but

she did not appear at his subsequent bench trial. The State called the officer who had questioned Amy, and asked him to recount what Amy told him and to authenticate the affidavit. Hershel's counsel repeatedly objected to the admission of this evidence. See *id.*, at 11, 12, 13, 17, 19, 20, 21. At one point, after hearing the prosecutor defend the affidavit because it was made "under oath," defense counsel said, "That doesn't give us the opportunity to cross examine [the] person who allegedly drafted it. Makes me mad." *Id.*, at 19. Nonetheless, the trial court admitted the affidavit as a "present sense impression," *id.*, at 20, and Amy's statements as "excited utterances" that "are expressly permitted in these kinds of cases even if the declarant is not available to testify." *Id.*, at 40. The officer thus testified that Amy

> "informed me that she and Hershel had been in an argument. That he became irrate [sic] over the fact of their daughter going to a boyfriend's house. The argument became . . . physical after being verbal and she informed me that Mr. Hammon, during the verbal part of the argument was breaking things in the living room and I believe she stated he broke the phone, broke the lamp, broke the front of the heater. When it became physical he threw her down into the glass of the heater.
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> . . . . .
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> "She informed me Mr. Hammon had pushed her onto the ground, had shoved her head into the broken glass of the heater and that he had punched her in the chest twice I believe." *Id.*, at 17–18.

The trial judge found Hershel guilty on both charges, *id.*, at 40, and the Indiana Court of Appeals affirmed in relevant part, 809 N. E. 2d 945 (2004). The Indiana Supreme Court also affirmed, concluding that Amy's statement was admissible for state-law purposes as an excited utterance,

829 N. E. 2d, at 449; that "a 'testimonial' statement is one given or taken in significant part for purposes of preserving it for potential future use in legal proceedings," where "the motivations of the questioner and declarant are the central concerns," *id.*, at 456, 457; and that Amy's oral statement was not "testimonial" under these standards, *id.*, at 458. It also concluded that, although the affidavit was testimonial and thus wrongly admitted, it was harmless beyond a reasonable doubt, largely because the trial was to the bench. *Id.*, at 458–459. We granted certiorari. 546 U. S. ___ (2005).

II

The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In *Crawford* v. *Washington*, 541 U. S. 36, 53–54 (2004), we held that this provision bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." A critical portion of this holding, and the portion central to resolution of the two cases now before us, is the phrase "testimonial statements." Only statements of this sort cause the declarant to be a "witness" within the meaning of the Confrontation Clause. See *id.*, at 51. It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.

Our opinion in *Crawford* set forth "[v]arious formulations" of the core class of "'testimonial'" statements, *ibid.*, but found it unnecessary to endorse any of them, because "some statements qualify under any definition," *id.*, at 52. Among those, we said, were "[s]tatements taken by police officers in the course of interrogations," *ibid.*; see also *id.*,

at 53. The questioning that generated the deponent's statement in *Crawford*—which was made and recorded while she was in police custody, after having been given *Miranda* warnings as a possible suspect herself—"qualifies under any conceivable definition" of an "'interrogation,'" 541 U. S., at 53, n. 4. We therefore did not define that term, except to say that "[w]e use [it] . . . in its colloquial, rather than any technical legal, sense," and that "one can imagine various definitions . . . , and we need not select among them in this case." *Ibid.* The character of the statements in the present cases is not as cle r, and these cases require us to determine more precisely which police interrogations produce testimony.

Without attempting to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[1]

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[1]Our holding refers to interrogations because, as explained below, the statements in the cases presently before us are the products of interrogations—which in some circumstances tend to generate testimonial responses. This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial. The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation. (Part of the evidence against Sir Walter Raleigh was a letter from Lord Cobham that was plainly *not* the result of sustained questioning. *Raleigh's Case*, 2 How. St. Tr. 1, 27 (1603).) And of course even when interrogation exists, it is

III

A

In *Crawford*, it sufficed for resolution of the case before us to determine that "even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class." *Id.*, at 53. Moreover, as we have just described, the facts of that case spared us the need to define what we meant by "interrogations." The *Davis* case today does not permit us this luxury of indecision. The inquiries of a police operator in the course of a 911 call[2] are an interrogation in one sense, but not in a sense that "qualifies under any conceivable definition." We must decide, therefore, whether the Confrontation Clause applies only to testimonial hearsay; and, if so, whether the recording of a 911 call qualifies.

The answer to the first question was suggested in *Crawford*, even if not explicitly held:

> "The text of the Confrontation Clause reflects this focus [on testimonial hearsay]. It applies to 'witnesses' against the accused—in other words, those who 'bear testimony.' 1 N. Webster, An American Dictionary of the English Language (1828). 'Testimony,' in turn, is typically 'a solemn declaration or affirmation made for the purpose of establishing or proving some fact.' *Ibid.* An accuser who makes a formal

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in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate.

[2]If 911 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 911 callers. For purposes of this opinion (and without deciding the point), we consider their acts to be acts of the police. As in *Crawford* v. *Washington*, 541 U. S. 36 (2004), therefore, our holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are "testimonial."

> statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." 541 U. S., at 51.

A limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its "core," but its perimeter.

We are not aware of any early American case invoking the Confrontation Clause or the common-law right to confrontation that did not clearly involve testimony as thus defined.[3] Well into the 20th century, our own Confrontation Clause jurisprudence was carefully applied only in the testimonial context. See, *e.g.*, *Reynolds* v. *United States*, 98 U. S. 145, 158 (1879) (testimony at prior trial was subject to the Confrontation Clause, but petitioner had forfeited that right by procuring witness's absence); *Mattox*

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[3]See, *e.g.*, *State* v. *Webb*, 2 N. C. 103, 103–104 (Super. L. & Eq. 1794) *(per curiam)* (excluding deposition taken in absence of the accused); *State* v. *Atkins*, 1 Tenn. 229 (Super. L. & Eq. 1807) *(per curiam)* (excluding prior testimony of deceased witness); *Johnston* v. *State*, 10 Tenn. 58, 59 (Err. & App. 1821) (admitting written deposition of deceased deponent, because defendant had the opportunity to cross-examine); *Finn* v. *Commonwealth*, 26 Va. 701, 707–708 (1827) (excluding prior testimony of a witness still alive, though outside the jurisdiction); *State* v. *Hill*, 20 S. C. L. 607 (App. 1835) (excluding deposition of deceased victim taken in absence of the accused); *Commonwealth* v. *Richards*, 35 Mass. 434, 436–439 (1837) (excluding preliminary examination testimony of deceased witness because the witness's precise words were not available); *Bostick* v. *State*, 22 Tenn. 344 (1842) (admitting deposition of deceased where defendant declined opportunity to cross-examine); *People* v. *Newman*, 5 Hill 295 (N. Y. Sup. Ct. 1843) *(per curiam)* (excluding prior trial testimony of witness who was still alive); *State* v. *Campbell*, 30 S. C. L. 124, 125 (App. L. 1844) (excluding deposition taken in absence of the accused); *State* v. *Valentine*, 29 N. C. 225 (1847) *(per curiam)* (admitting preliminary examination testimony of decedent where defendant had opportunity to cross-examine); *Kendrick* v. *State*, 29 Tenn. 479, 491 (1850) (admitting testimony of deceased witness at defendant's prior trial); *State* v. *Houser*, 26 Mo. 431, 439–441 (1858) (excluding deposition of deponent who was still alive).

v. *United States*, 156 U. S. 237, 240–244 (1895) (prior trial testimony of deceased witnesses admitted because subject to cross-examination); *Kirby* v. *United States*, 174 U. S. 47, 55–56 (1899) (guilty pleas and jury conviction of others could not be admitted to show that property defendant received from them was stolen); *Motes* v. *United States*, 178 U. S. 458, 467, 470–471 (1900) (written deposition subject to cross-examination was not admissible because witness was available); *Dowdell* v. *United States*, 221 U. S. 325, 330–331 (1911) (facts regarding conduct of prior trial certified to by the judge, the clerk of court, and the official reporter did not relate to defendants' guilt or innocence and hence were not statements of "witnesses" under the Confrontation Clause).

Even our later cases, conforming to the reasoning of *Ohio* v. *Roberts*, 448 U. S. 56 (1980),[4] never in practice dispensed with the Confrontation Clause requirements of unavailability and prior cross-examination in cases that involved testimonial hearsay, see *Crawford*, 541 U. S., at 57–59 (citing cases), with one arguable exception, see *id.*, at 58, n. 8 (discussing *White* v. *Illinois*, 502 U. S. 346 (1992)). Where our cases did dispense with those requirements—even under the *Roberts* approach—the statements at issue were clearly nontestimonial. See, *e.g.*, *Bourjaily* v. *United States*, 483 U. S. 171, 181–184 (1987) (statements made unwittingly to a Government informant); *Dutton* v. *Evans*, 400 U. S. 74, 87–89 (1970) (plurality opinion) (statements from one prisoner to another).

Most of the American cases applying the Confrontation Clause or its state constitutional or common-law counterparts involved testimonial statements of the most formal

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[4] "*Roberts* condition[ed] the admissibility of all hearsay evidence on whether it falls under a 'firmly rooted hearsay exception' or bears 'particularized guarantees of trustworthiness.'" *Crawford*, 541 U. S., at 60 (quoting *Roberts*, 448 U. S., at 66). We overruled *Roberts* in *Crawford* by restoring the unavailability and cross-examination requirements.

sort—sworn testimony in prior judicial proceedings or formal depositions under oath—which invites the argument that the scope of the Clause is limited to that very formal category. But the English cases that were the progenitors of the Confrontation Clause did not limit the exclusionary rule to prior court testimony and formal depositions, see *Crawford*, *supra*, at 52, and n. 3. In any event, we do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition. Indeed, if there is one point for which no case—English or early American, state or federal—can be cited, that is it.

The question before us in *Davis*, then, is whether, objectively considered, the interrogation that took place in the course of the 911 call produced testimonial statements. When we said in *Crawford*, *supra*, at 53, that "interrogations by law enforcement officers fall squarely within [the] class" of testimonial hearsay, we had immediately in mind (for that was the case before us) interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator. The product of such interrogation, whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial. It is, in the terms of the 1828 American dictionary quoted in *Crawford*, "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" 541 U. S., at 51. (The solemnity of even an oral declaration of relevant past fact to an investigating officer is well enough established by the severe consequences that can attend a deliberate falsehood. See, *e.g.*, *United States* v. *Stewart*, 433 F. 3d 273, 288 (CA2 2006) (false statements made to federal investigators violate 18 U. S. C. §1001); *State* v. *Reed*, 2005 WI 53, ¶30, 695 N. W.

2d 315, 323 (state criminal offense to "knowingly giv[e] false information to [an] officer with [the] intent to mislead the officer in the performance of his or her duty").) A 911 call, on the other hand, and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to "establis[h] or prov[e]" some past fact, but to describe current circumstances requiring police assistance.

The difference between the interrogation in *Davis* and the one in *Crawford* is apparent on the face of things. In *Davis*, McCottry was speaking about events *as they were actually happening*, rather than "describ[ing] past events," *Lilly* v. *Virginia*, 527 U. S. 116, 137 (1999) (plurality opinion). Sylvia Crawford's interrogation, on the other hand, took place hours after the events she described had occurred. Moreover, any reasonable listener would recognize that McCottry (unlike Sylvia Crawford) was facing an ongoing emergency. Although one *might* call 911 to provide a narrative report of a crime absent any imminent danger, McCottry's call was plainly a call for help against bona fide physical threat. Third, the nature of what was asked and answered in *Davis*, again viewed objectively, was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past. That is true even of the operator's effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon. See, *e.g.*, *Hiibel* v. *Sixth Judicial Dist. Court of Nev., Humboldt Cty.*, 542 U. S. 177, 186 (2004). And finally, the difference in the level of formality between the two interviews is striking. Crawford was responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers; McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or

even (as far as any reasonable 911 operator could make out) safe.

We conclude from all this that the circumstances of McCottry's interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a *witness;* she was not *testifying*. What she said was not "a weaker substitute for live testimony" at trial, *United States* v. *Inadi*, 475 U. S. 387, 394 (1986), like Lord Cobham's statements in *Raleigh's Case*, 2 How. St. Tr. 1 (1603), or Jane Dingler's *ex parte* statements against her husband in *King* v. *Dingler*, 2 Leach 561, 168 Eng. Rep. 383 (1791), or Sylvia Crawford's statement in *Crawford*. In each of those cases, the *ex parte* actors and the evidentiary products of the *ex parte* communication aligned perfectly with their courtroom analogues. McCottry's emergency statement does not. No "witness" goes into court to proclaim an emergency and seek help.

Davis seeks to cast McCottry in the unlikely role of a witness by pointing to English cases. None of them involves statements made during an ongoing emergency. In *King* v. *Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (1779), for example, a young rape victim, "immediately on her coming home, told all the circumstances of the injury" to her mother. *Id.*, at 200, 168 Eng. Rep., at 202. The case would be helpful to Davis if the relevant statement had been the girl's screams for aid as she was being chased by her assailant. But by the time the victim got home, her story was an account of past events.

This is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance cannot, as the Indiana Supreme Court put it, "evolve into testimonial statements," 829 N. E. 2d, at 457, once that purpose has been achieved. In this case, for example, after the operator gained the information needed to address the exigency of the moment, the emergency appears

to have ended (when Davis drove away from the premises). The operator then told McCottry to be quiet, and proceeded to pose a battery of questions. It could readily be maintained that, from that point on, McCottry's statements were testimonial, not unlike the "structured police questioning" that occurred in *Crawford*, 541 U. S., at 53, n. 4. This presents no great problem. Just as, for Fifth Amendment purposes, "police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect," *New York* v. *Quarles*, 467 U. S. 649, 658–659 (1984), trial courts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial. Through *in limine* procedure, they should redact or exclude the portions of any statement that have become testimonial, as they do, for example, with unduly prejudicial portions of otherwise admissible evidence. Davis's jury did not hear the *complete* 911 call, although it may well have heard some testimonial portions. We were asked to classify only McCottry's early statements identifying Davis as her assailant, and we agree with the Washington Supreme Court that they were not testimonial. That court also concluded that, even if later parts of the call were testimonial, their admission was harmless beyond a reasonable doubt. Davis does not challenge that holding, and we therefore assume it to be correct.

B

Determining the testimonial or nontestimonial character of the statements that were the product of the interrogation in *Hammon* is a much easier task, since they were not much different from the statements we found to be testimonial in *Crawford*. It is entirely clear from the circumstances that the interrogation was part of an inves-

tigation into possibly criminal past conduct—as, indeed, the testifying officer expressly acknowledged, App. in No. 05–5705, at 25, 32, 34. There was no emergency in progress; the interrogating officer testified that he had heard no arguments or crashing and saw no one throw or break anything, *id.*, at 25. When the officers first arrived, Amy told them that things were fine, *id.*, at 14, and there was no immediate threat to her person. When the officer questioned Amy for the second time, and elicited the challenged statements, he was not seeking to determine (as in *Davis*) "what is happening," but rather "what happened." Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime—which is, of course, precisely what the officer *should* have done.

It is true that the *Crawford* interrogation was more formal. It followed a *Miranda* warning, was tape-recorded, and took place at the station house, see 541 U. S., at 53, n. 4. While these features certainly strengthened the statements' testimonial aspect—made it more objectively apparent, that is, that the purpose of the exercise was to nail down the truth about past criminal events—none was essential to the point. It was formal enough that Amy's interrogation was conducted in a separate room, away from her husband (who tried to intervene), with the officer receiving her replies for use in his "investigat[ion]." App. in No. 05–5705, at 34. What we called the "striking resemblance" of the *Crawford* statement to civil-law *ex parte* examinations, 541 U. S., at 52, is shared by Amy's statement here. Both declarants were actively separated from the defendant—officers forcibly prevented Hershel from participating in the interrogation. Both statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed. And both took place some time after the events described were over. Such statements

under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial.[5]

Both Indiana and the United States as *amicus curiae*

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[5]The dissent criticizes our test for being "neither workable nor a targeted attempt to reach the abuses forbidden by the [Confrontation] Clause," *post*, at 9 (opinion of THOMAS, J.). As to the former: We have acknowledged that our holding is not an "exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation," *supra*, at 7, but rather a resolution of the cases before us and those like them. For *those* cases, the test is objective and quite "workable." The dissent, in attempting to formulate an exhaustive classification of its own, has not provided anything that deserves the description "workable"—unless one thinks that the distinction between "formal" and "informal" statements, see *post*, at 4–5, qualifies. And the dissent even qualifies that vague distinction by acknowledging that the Confrontation Clause "also reaches the use of technically informal statements when used to evade the formalized process," *post*, at 5, and cautioning that the Clause would stop the State from "us[ing] out-of-court statements as a means of circumventing the literal right of confrontation," *post*, at 6. It is hard to see this as much more "predictable," *ibid.*, than the rule we adopt for the narrow situations we address. (Indeed, under the dissent's approach it is eminently arguable that the dissent should agree, rather than disagree, with our disposition in *Hammon* v. *Indiana*, No. 05-5705.)

As for the charge that our holding is not a "targeted attempt to reach the abuses forbidden by the [Confrontation] Clause," which the dissent describes as the depositions taken by Marian magistrates, characterized by a high degree of formality, see *post*, at 2–3: We do not dispute that formality is indeed essential to testimonial utterance. But we no longer have examining Marian magistrates; and we do have, as our 18th-century forebears did not, examining police officers, see L. Friedman, Crime and Punishment in American History 67–68 (1993)—who perform investigative and testimonial functions once performed by examining Marian magistrates, see J. Langbein, The Origins of Adversary Criminal Trial 41 (2003). It imports sufficient formality, in our view, that lies to such officers are criminal offenses. Restricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction. Cf. *Kyllo* v. *United States*, 533 U. S. 27 (2001).

argue that this case should be resolved much like *Davis*. For the reasons we find the comparison to *Crawford* compelling, we find the comparison to *Davis* unpersuasive. The statements in *Davis* were taken when McCottry was alone, not only unprotected by police (as Amy Hammon was protected), but apparently in immediate danger from Davis. She was seeking aid, not telling a story about the past. McCottry's present-tense statements showed immediacy; Amy's narrative of past events was delivered at some remove in time from the danger she described. And after Amy answered the officer's questions, he had her execute an affidavit, in order, he testified, "[t]o establish events that have occurred previously." App. in No. 05–5705, at 18.

Although we necessarily reject the Indiana Supreme Court's implication that virtually any "initial inquiries" at the crime scene will not be testimonial, see 829 N. E. 2d, at 453, 457, we do not hold the opposite—that *no* questions at the scene will yield nontestimonial answers. We have already observed of domestic disputes that "[o]fficers called to investigate . . . need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim." *Hiibel*, 542 U. S., at 186. Such exigencies may *often* mean that "initial inquiries" produce nontestimonial statements. But in cases like this one, where Amy's statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation, the fact that they were given at an alleged crime scene and were "initial inquiries" is immaterial. Cf. *Crawford, supra*, at 52, n. 3.[6]

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[6]Police investigations themselves are, of course, in no way impugned by our characterization of their fruits as testimonial. Investigations of past crimes prevent future harms and lead to necessary arrests. While prosecutors may hope that inculpatory "nontestimonial" evidence is gathered, this is essentially beyond police control. Their saying that an

IV

Respondents in both cases, joined by a number of their *amici*, contend that the nature of the offenses charged in these two cases—domestic violence—requires greater flexibility in the use of testimonial evidence. This particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial. When this occurs, the Confrontation Clause gives the criminal a windfall. We may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free. Cf. *Kyllo* v. *United States*, 533 U. S. 27 (2001) (suppressing evidence from an illegal search). But when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system. We reiterate what we said in *Crawford:* that "the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds." 541 U. S., at 62 (citing *Reynolds*, 98 U. S., at 158–159). That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.

We take no position on the standards necessary to demonstrate such forfeiture, but federal courts using Federal Rule of Evidence 804(b)(6), which codifies the forfeiture doctrine, have generally held the Government to the preponderance-of-the-evidence standard, see, *e.g.*, *United*

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emergency exists cannot make it be so. The Confrontation Clause in no way governs police conduct, because it is the trial *use* of, not the investigatory *collection* of, *ex parte* testimonial statements which offends that provision. But neither can police conduct govern the Confrontation Clause; testimonial statements are what they are.

States v. *Scott*, 284 F. 3d 758, 762 (CA7 2002). State courts tend to follow the same practice, see, *e.g.*, *Commonwealth* v. *Edwards*, 444 Mass. 526, 542, 830 N. E. 2d 158, 172 (2005). Moreover, if a hearing on forfeiture is required, *Edwards*, for instance, observed that "hearsay evidence, including the unavailable witness's out-of-court statements, may be considered." *Id.*, at 545, 830 N. E. 2d, at 174. The *Roberts* approach to the Confrontation Clause undoubtedly made recourse to this doctrine less necessary, because prosecutors could show the "reliability" of *ex parte* statements more easily than they could show the defendant's procurement of the witness's absence. *Crawford*, in overruling *Roberts*, did not destroy the ability of courts to protect the integrity of their proceedings.

We have determined that, absent a finding of forfeiture by wrongdoing, the Sixth Amendment operates to exclude Amy Hammon's affidavit. The Indiana courts may (if they are asked) determine on remand whether such a claim of forfeiture is properly raised and, if so, whether it is meritorious.

* * *

We affirm the judgment of the Supreme Court of Washington in No. 05–5224. We reverse the judgment of the Supreme Court of Indiana in No. 05–5705, and remand the case to that Court for proceedings not inconsistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

Nos. 05–5224 and 05–5705

ADRIAN MARTELL DAVIS, PETITIONER
05–5224 *v.*
WASHINGTON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

HERSHEL HAMMON, PETITIONER
05–5705 *v.*
INDIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

[June 19, 2006]

JUSTICE THOMAS, concurring in the judgment in part and dissenting in part.

In *Crawford* v. *Washington*, 541 U. S. 36 (2004), we abandoned the general reliability inquiry we had long employed to judge the admissibility of hearsay evidence under the Confrontation Clause, describing that inquiry as "*inherently*, and therefore *permanently*, unpredictable." *Id.*, at 68, n. 10 (emphasis in original). Today, a mere two years after the Court decided *Crawford*, it adopts an equally unpredictable test, under which district courts are charged with divining the "primary purpose" of police interrogations. *Ante*, at 7. Besides being difficult for courts to apply, this test characterizes as "testimonial," and therefore inadmissible, evidence that bears little resemblance to what we have recognized as the evidence targeted by the Confrontation Clause. Because neither of the cases before the Court today would implicate the

Confrontation Clause under an appropriately targeted standard, I concur only in the judgment in *Davis* v. *Washington*, No. 05–5224, and dissent from the Court's resolution of *Hammon* v. *Indiana*, No. 05–5705.

I

A

The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U. S. Const., Amdt. 6. We have recognized that the operative phrase in the Clause, "witnesses against him," could be interpreted narrowly, to reach only those witnesses who actually testify at trial, or more broadly, to reach many or all of those whose out-of-court statements are offered at trial. *Crawford*, *supra*, at 42–43; *White* v. *Illinois*, 502 U. S. 346, 359–363 (1992) (THOMAS, J., concurring in part and concurring in judgment). Because the narrowest interpretation of the Clause would conflict with both the history giving rise to the adoption of the Clause and this Court's precedent, we have rejected such a reading. See *Crawford*, *supra*, at 50–51; *White*, *supra*, at 360 (opinion of THOMAS, J.).

Rejection of the narrowest view of the Clause does not, however, require the broadest application of the Clause to exclude otherwise admissible hearsay evidence. The history surrounding the right to confrontation supports the conclusion that it was developed to target particular practices that occurred under the English bail and committal statutes passed during the reign of Queen Mary, namely, the "civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Crawford*, *supra*, at 43, 50; *White*, *supra*, at 361–362 (opinion of THOMAS, J.); *Mattox* v. *United States*, 156 U. S. 237, 242 (1895). "The predominant purpose of the [Marian committal] statute was to

institute *systematic* questioning of the accused and the witnesses." J. Langbein, Prosecuting Crime in the Renaissance 23 (1974) (emphasis added). The statute required an oral examination of the suspect and the accusers, transcription within two days of the examinations, and physical transmission to the judges hearing the case. *Id.*, at 10, 23. These examinations came to be used as evidence in some cases, in lieu of a personal appearance by the witness. *Crawford*, *supra*, at 43–44; 9 W. Holdsworth, A History of English Law 223–229 (1926). Many statements that would be inadmissible as a matter of hearsay law bear little resemblance to these evidentiary practices, which the Framers proposed the Confrontation Clause to prevent. See, *e.g.*, *Crawford*, *supra*, at 51 (contrasting "[a]n off-hand, overheard remark" with the abuses targeted by the Confrontation Clause). Accordingly, it is unlikely that the Framers intended the word "witness" to be read so broadly as to include such statements. Cf. *Dutton* v. *Evans*, 400 U. S. 74, 94 (1970) (Harlan, J., concurring in result) (rejecting the "assumption that the core purpose of the Confrontation Clause of the Sixth Amendment is to prevent overly broad exceptions to the hearsay rule").

In *Crawford*, we recognized that this history could be squared with the language of the Clause, giving rise to a workable, and more accurate, interpretation of the Clause. "'[W]itnesses,'" we said, are those who "'bear testimony.'" 541 U. S., at 51 (quoting 1 N. Webster, An American Dictionary of the English Language (1828)). And "'[t]estimony'" is "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Ibid.* (quoting Webster, *supra*). Admittedly, we did not set forth a detailed framework for addressing whether a statement is "testimonial" and thus subject to the Confrontation Clause. But the plain terms of the "testimony" definition we endorsed necessarily require some degree of solemnity

before a statement can be deemed "testimonial."

This requirement of solemnity supports my view that the statements regulated by the Confrontation Clause must include "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." *White*, *supra*, at 365 (opinion of THOMAS, J.). Affidavits, depositions, and prior testimony are, by their very nature, taken through a formalized process. Likewise, confessions, when extracted by police in a formal manner, carry sufficient indicia of solemnity to constitute formalized statements and, accordingly, bear a "striking resemblance," *Crawford*, *supra*, at 52, to the examinations of the accused and accusers under the Marian statutes.[1] See generally Langbein, *supra*, at 21–34.

Although the Court concedes that the early American cases invoking the right to confrontation or the Confrontation Clause itself all "clearly involve[d] testimony" as defined in *Crawford*, *ante*, at 9, it fails to acknowledge that all of the cases it cites fall within the narrower category of formalized testimonial materials I have proposed. See *ante*, at 9, n. 3.[2] Interactions between the police and

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[1]Like the Court, I presume the acts of the 911 operator to be the acts of the police. *Ante*, at 8, n. 2. Accordingly, I refer to both the operator in *Davis* and the officer in *Hammon*, and their counterparts in similar cases, collectively as "the police."

[2]Our more recent cases, too, nearly all hold excludable under the Confrontation Clause materials that are plainly highly formal. See *White* v. *Illinois*, 502 U. S. 346, 365, n. 2 (1992) (THOMAS, J., concurring in part and concurring in judgment). The only exceptions involve confessions of codefendants to police, and those confessions appear to have either been formal due to their occurrence in custody or to have been formalized into signed documents. See *Douglas* v. *Alabama*, 380 U. S. 415, 416 (1965) (signed confession); *Brookhart* v. *Janis*, 384 U. S. 1 (1966) (signed confession taken after accomplice's arrest, see Brief for Petitioner in *Brookhart* v. *Janis*, O. T. 1965, No. 657, pp. 10–11); *Bruton* v. *United States*, 391 U. S. 123, 124 (1968) (custodial interrogation); *Roberts* v. *Russell*, 392 U. S. 293 (1968) *(per curiam)* (custodial

an accused (or witnesses) resemble Marian proceedings—and these early cases—only when the interactions are somehow rendered "formal." In *Crawford*, for example, the interrogation was custodial, taken after warnings given pursuant to *Miranda* v. *Arizona*, 384 U. S. 436 (1966). 541 U. S., at 38. *Miranda* warnings, by their terms, inform a prospective defendant that "'anything he says can be used against him in a court of law.'" *Dickerson* v. *United States*, 530 U. S. 428, 435 (2000) (quoting *Miranda*, *supra*, at 479). This imports a solemnity to the process that is not present in a mere conversation between a witness or suspect and a police officer.[3]

The Court all but concedes that no case can be cited for its conclusion that the Confrontation Clause also applies to informal police questioning under certain circumstances. *Ante*, at 9–11. Instead, the sole basis for the Court's conclusion is its apprehension that the Confrontation Clause will "readily be evaded" if it is only applicable to formalized testimonial materials. *Ante*, at 11. But the Court's proposed solution to the risk of evasion is needlessly overinclusive. Because the Confrontation Clause sought to regulate prosecutorial abuse occurring through use of *ex parte* statements as evidence against the accused, it also reaches the use of technically informal statements when used to evade the formalized process. Cf. *ibid.* That is, even if the interrogation itself is not formal, the production of evidence by the prosecution at trial would resemble the abuses targeted by the Confrontation Clause if the

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interrogation following a warning that the co-defendant's statement could be used against her at trial, see Brief in Opposition, O. T. 1967, No. 920, pp. 5–6).

[3]The possibility that an oral declaration of past fact to a police officer, if false, could result in legal consequences to the speaker, see *ante*, at 11–12, may render honesty in casual conversations with police officers important. It does not, however, render those conversations solemn or formal in the ordinary meanings of those terms.

prosecution attempted to use out-of-court statements as a means of circumventing the literal right of confrontation, see *Coy* v. *Iowa*, 487 U. S. 1012 (1988). In such a case, the Confrontation Clause could fairly be applied to exclude the hearsay statements offered by the prosecution, preventing evasion without simultaneously excluding evidence offered by the prosecution in good faith.

The Court's standard is not only disconnected from history and unnecessary to prevent abuse; it also yields no predictable results to police officers and prosecutors attempting to comply with the law. Cf. *Crawford*, *supra*, at 68, n. 10 (criticizing unpredictability of the pre-*Crawford* test); *White*, 502 U. S., at 364–365 (THOMAS, J., concurring in part and concurring in judgment) (limiting the Confrontation Clause to the discrete category of materials historically abused would "greatly simplify" application of the Clause). In many, if not most, cases where police respond to a report of a crime, whether pursuant to a 911 call from the victim or otherwise, the purposes of an interrogation, viewed from the perspective of the police, are *both* to respond to the emergency situation *and* to gather evidence. See *New York* v. *Quarles*, 467 U. S. 649, 656 (1984) ("Undoubtedly most police officers [deciding whether to give *Miranda* warnings in a possible emergency situation] would act out of a host of different, instinctive, and largely unverifiable motives—their own safety, the safety of others, and perhaps as well the desire to obtain incriminating evidence from the suspect"). Assigning one of these two "largely unverifiable motives," *ibid.*, primacy requires constructing a hierarchy of purpose that will rarely be present—and is not reliably discernible. It will inevitably be, quite simply, an exercise in fiction.

The Court's repeated invocation of the word "objectiv[e]" to describe its test, see *ante*, at 7, 11–13, 15, however, suggests that the Court may not mean to reference purpose at all, but instead to inquire into the function

served by the interrogation. Certainly such a test would avoid the pitfalls that have led us repeatedly to reject tests dependent on the subjective intentions of police officers.[4] It would do so, however, at the cost of being even more disconnected from the prosecutorial abuses targeted by the Confrontation Clause. Additionally, it would shift the ability to control whether a violation occurred from the police and prosecutor to the judge, whose determination as to the "primary purpose" of a particular interrogation would be unpredictable and not necessarily tethered to the actual purpose for which the police performed the interrogation.

B

Neither the 911 call at issue in *Davis* nor the police questioning at issue in *Hammon* is testimonial under the appropriate framework. Neither the call nor the questioning is itself a formalized dialogue.[5] Nor do any circumstances surrounding the taking of the statements render those statements sufficiently formal to resemble the Marian examinations; the statements were neither Mirandized nor custodial, nor accompanied by any similar indicia of formality. Finally, there is no suggestion that the prosecution attempted to offer the women's hearsay

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[4]See *New York* v. *Quarles*, 467 U. S. 649, 655–656, and n. 6 (1984) (subjective motivation of officer not relevant in considering whether the public safety exception to *Miranda* v. *Arizona*, 384 U. S. 436 (1966), is applicable); *Rhode Island* v. *Innis*, 446 U. S. 291, 301 (1980) (subjective intent of police officer to obtain incriminatory statement not relevant to whether an interrogation has occurred); *Whren* v. *United States*, 517 U. S. 806, 813 (1996) (refusing to evaluate Fourth Amendment reasonableness in light of the officers' actual motivations).

[5]Although the police questioning in *Hammon* was ultimately reduced to an affidavit, all agree that the affidavit is inadmissible *per se* under our definition of the term "testimonial." Brief for Respondent in No. 05–5705, p. 46; Brief for United States as *Amicus Curiae* in No. 05–5705, p. 14.

evidence at trial in order to evade confrontation. See 829 N. E. 2d 444, 447 (Ind. 2005) (prosecution subpoenaed Amy Hammon to testify, but she was not present); 154 Wash. 2d 291, 296, 111 P. 3d 844, 847 (2005) (en banc) (State was unable to locate Michelle McCottry at the time of trial). Accordingly, the statements at issue in both cases are nontestimonial and admissible under the Confrontation Clause.

The Court's determination that the evidence against Hammon must be excluded extends the Confrontation Clause far beyond the abuses it was intended to prevent. When combined with the Court's holding that the evidence against Davis is perfectly admissible, however, the Court's *Hammon* holding also reveals the difficulty of applying the Court's requirement that courts investigate the "primary purpose[s]" of the investigation. The Court draws a line between the two cases based on its explanation that *Hammon* involves "no emergency in progress," but instead, mere questioning as "part of an investigation into possibly criminal past conduct," *ante*, at 14–15, and its explanation that *Davis* involves questioning for the "primary purpose" of "enabl[ing] police assistance to meet an ongoing emergency," *ante*, at 13. But the fact that the officer in *Hammon* was investigating Mr. Hammon's past conduct does not foreclose the possibility that the primary purpose of his inquiry was to assess whether Mr. Hammon constituted a continuing danger to his wife, requiring further police presence or action. It is hardly remarkable that Hammon did not act abusively towards his wife in the presence of the officers, *ante*, at 15, and his good judgment to refrain from criminal behavior in the presence of police sheds little, if any, light on whether his violence would have resumed had the police left without further questioning, transforming what the Court dismisses as "past con-

duct" back into an "ongoing emergency." *Ante*, at 13, 15.[6] Nor does the mere fact that McCottry needed emergency aid shed light on whether the "primary purpose" of gathering, for example, the name of her assailant was to protect the police, to protect the victim, or to gather information for prosecution. In both of the cases before the Court, like many similar cases, pronouncement of the "primary" motive behind the interrogation calls for nothing more than a guess by courts.

II

Because the standard adopted by the Court today is neither workable nor a targeted attempt to reach the abuses forbidden by the Clause, I concur only in the judgment in *Davis* v. *Washington*, No. 05–5224, and respectfully dissent from the Court's resolution of *Hammon* v. *Indiana*, No. 05–5705.

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[6]Some of the factors on which the Court relies to determine that the police questioning in *Hammon* was testimonial apply equally in *Davis*. For example, while Hammon was "actively separated from the [victim]" and thereby "prevented . . . from participating in the interrogation," Davis was apart from McCottry while she was questioned by the 911 operator and thus unable to participate in the questioning. *Ante*, at 2, 15. Similarly, "the events described [by McCottry] were over" by the time she recounted them to the 911 operator. *Ibid.* See 154 Wash. 2d 291, 295–296, 111 P. 3d 844, 846–847 (2005) (en banc).